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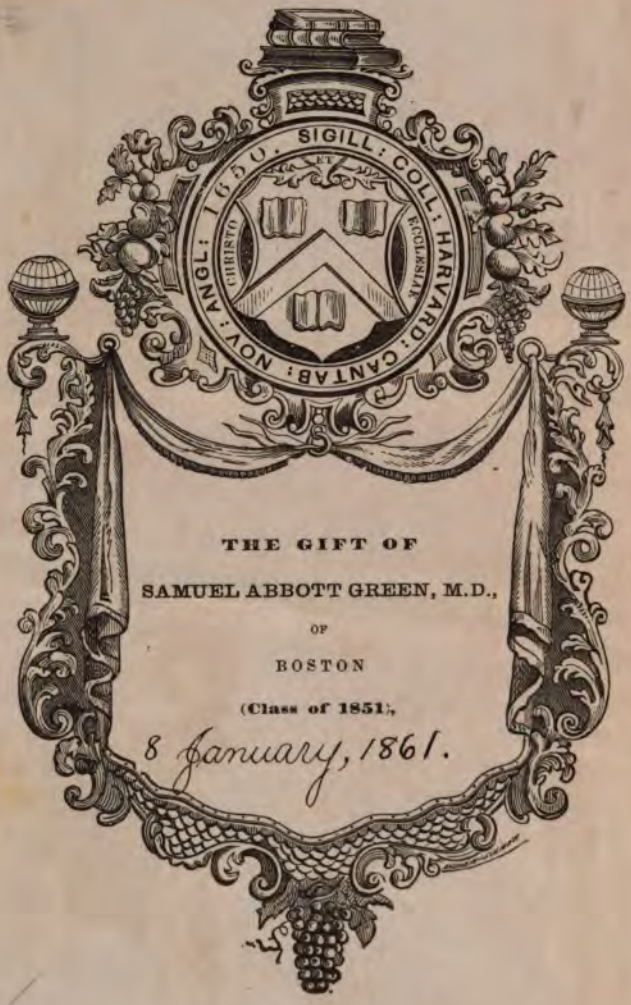

THE GIFT OF

SAMUEL ABBOTT GREEN, M.D.,

OF

BOSTON

(Class of 1851),

8 January, 1861.

24/2/33

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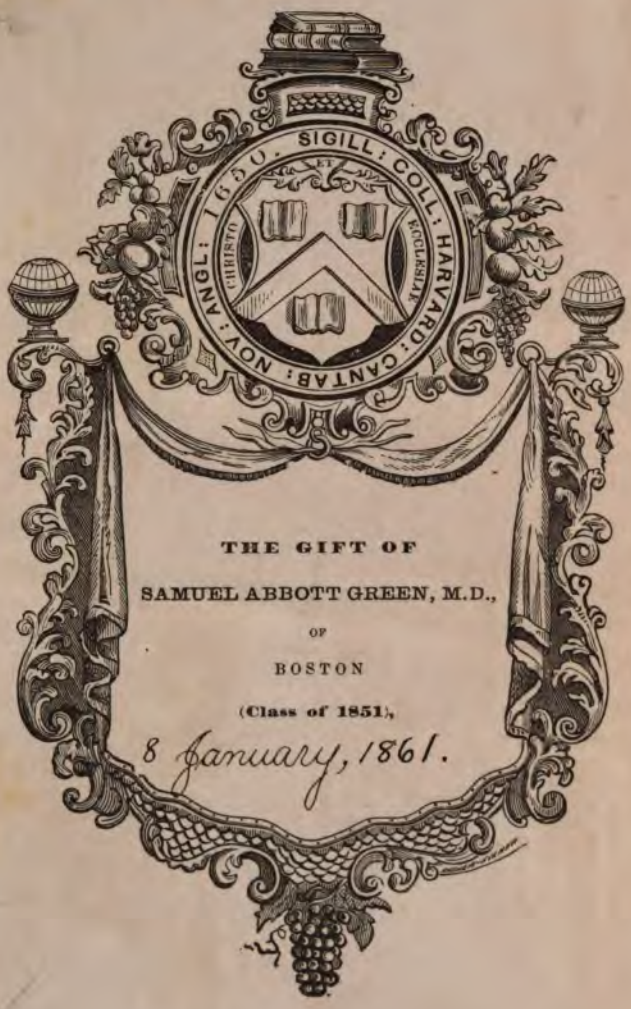

THE GIFT OF

SAMUEL ABBOTT GREEN, M.D.,

OF

BOSTON

(Class of 1851),

8 January, 1861.

REVIEW

OF THE

D'HAUTEVILLE CASE:

RECENTLY

ARGUED AND DETERMINED

IN THE

COURT OF GENERAL SESSIONS,

FOR THE

CITY AND COUNTY OF PHILADELPHIA.

BY A MEMBER OF THE BOSTON BAR.

REPRINTED FROM THE JANUARY NUMBER OF THE LAW REPORTER.

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THE following article was prepared for the Law Reporter, a monthly Law Journal, published in Boston. Several professional gentlemen having expressed a desire that it might be presented in a form more accessible to the public at large, it is now re-printed. The writer desires to remark, that he was interrupted in the preparation of the article, by professional engagements; and in order to publish the magazine in its proper season, a greater part of these remarks were printed as they were written, without an opportunity for the careful revision, which was desirable. It is also proper to say, in relation to a report which has come to his ears, that the counsel of Mr d'Hauteville have no connection with this article, and never saw it, until after its publication. The manuscript was never seen by any person but the writer; and he alone is responsible for the opinions here advanced.

BOSTON, JANUARY 8, 1841. P. W. C.

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REVIEW

OF THE

D'HAUTEVILLE CASE:*

At the July term of the court of general sessions for the city and county of Philadelphia, a writ of habeas corpus was issued at the instance of Paul Daniel Gonzalve Grand d'Hauteville, directed to Ellen, his wife, and to David and Miriam C. Sears, her parents, commanding them to have before the court the body of Frederick, the infant son of the petitioner and the said Ellen.

In the petition upon which the writ was issued, Mr d'Hauteville set forth that he was a citizen of the Canton de Vaud, in Switzerland; and that he was married in the church of Montreux, in the said canton, and according to its laws, on the 22d of August, 1837, to Ellen Sears, whose father was then a citizen of Massachusetts, in the United States. That in the early part of 1838, his wife, with his consent, came to Boston on a temporary visit; and has since, without any just cause known to the petitioner, refused to return to him, or has been prevented from doing so, and that on the 27th of September following, she gave birth to the child whose custody he now claims. Mr d'Hauteville adds, that he arrived in the United States in July, 1839, and has ever since been engaged in a fruitless attempt to recover his wife and child, the latter of whom has been restrained of its liberty by its mother and her parents, and detained by them in this country against his consent and permission.

To the writ of habeas corpus, Mr and Mrs Sears severally returned, that the said child was not in their custody, which they did not claim, and never had claimed. That the child and its mother were, and for some time had been living with them, or one of them, for comfort and protection, which she (their daughter) entirely merited, and would continue to receive, while it should be in their power to give it.

Mrs d'Hauteville made return, that she was possessed of the custody

* Report of the d'Hauteville Case:—The Commonwealth of Pennsylvania, at the suggestion of Paul Daniel Gonzalve Grand d'Hauteville, *versus* David Sears, Miriam C. Sears, and Ellen Sears Grand d'Hauteville. Habeas corpus for the custody of an infant child. Philadelphia: Printed by William S. Martien. 1840.

of her child ; that, as the mother, she claimed and was entitled to such custody, for the proper and necessary purposes of its care and guardianship, and for no other purpose ; and that it was in no respect restrained of its liberty, or detained illegally. That its moral and religious education was, and would continue to be, suitably attended to ; that, in her own separate right, she was possessed of ample means for its suitable support and education ; and that its age did not admit of its separation from her without the greatest danger to its health, and even of its life, which had been more than once severely threatened by attacks of illness. Mrs d'Hauteville further avered, that she had left her husband, and was compelled to continue in a state of separation from him, in consequence of 'a variety of circumstances,' some of which were specified in her return, and others more particularly detailed in her further return, but all based upon an alleged total failure of the husband to realize the expectations of sympathy and affection which he had excited previous to obtaining her consent of marriage, and a course of conduct towards herself and mother which had rendered her 'inexpressibly wretched,' and finally induced the conviction 'that there was to be no mitigation of her sufferings while she continued in his society, and under his constraint.' Mrs d'Hauteville added, that 'her parents had, at her request, considered the causes of this separation, and given it their entire sanction and approval.'

In the suggestion and further suggestion filed by Mr d'Hauteville, 'he denied, utterly and unreservedly, any just cause for separation, and any consciousness on his part of any matter or design other than an affectionate husband should conceive ; nor was he aware, nor had he ever been aware, of any reason other than such as arose from the course his misguided wife had, by unhappy counsels, been led to pursue, which could exist for the interruption of their peace and comfort.' Throughout the whole of the voluminous writings filed by the relator in reply to those submitted by his wife, he breathed the most anxious desire for her to return to his home and society.

Upon the issue thus presented, the court proceeded to give an opinion, which will be found in the last number of the Law Reporter, page 304. The respective parties were heard before the court many times, and the case was not concluded until November last. The parties went into all the circumstances attending the marriage, and the whole history of their intercourse as man and wife, with a minuteness of detail, which necessarily gave a painful notoriety to many circumstances of domestic life. In order to understand the merits of the case fully, we shall find it necessary to follow them in this course, because, if the respondent has failed to show any adequate cause for separating herself from her husband, it is an important question whether she and her parents, who approve her course, have not fallen into a fatal error upon a fundamental point of morals—the obligation of the marriage contract, and are not therefore persons whose precepts and example will be calculated to exercise a pernicious influence on the child.

In the winter of 1836—7 the relator made the acquaintance of the respondent, who, with her parents and a part of their family, were spending some time in Paris. In May, 1837, the respondent, who was very beautiful and accomplished, completed her eighteenth year. About that time, the relator, who was of a highly respectable family in Switzerland, sought an introduction to the family of the respondent, to whom he was represented as a gentleman desirous of cultivating the slight acquaintance which he had formerly made with her. It was also understood by the respondent and her family, that he was to have a million of francs on the day of his marriage, besides future expectations. In a short time, he offered his hand, which was at first refused, then accepted ; and after some delays, which will be noticed further on, the parties were married, in the presence of their parents, and with their full approbation and consent.

The respondent, Mrs d'Hauteville, constantly avers, that the marriage, on her part, was one of duty, rather than inclination or affection. If this were true, it could not affect favorably her claim to the custody of the child, but must be taken as a strong fact against her fitness for that duty, and would tend to throw a shade of suspicion upon the integrity of her character. But there is nothing whatever in the case to show that the alliance was not considered by her as highly desirable, or that her feelings were of the kind she represents. The relator was an intimate friend in her father's family. He was well known and highly respected by herself and friends. He was freely accepted by her. The full and free consent of her parents had been previously given ; and there was no serious difficulty whatever, until it was discovered that the relator was not as wealthy as he had been supposed to be. Then it was, that the marriage engagement was broken off; and all the subsequent difficulties which occurred before the parties were married, are easily enough accounted for upon other suppositions than a want of affection on her part. That the relator was most sincerely and passionately attached to the respondent, is beyond all question ; and it is difficult to see how it can excuse her subsequent conduct in deserting him, or assist her claim to the custody of the child, that she deceived her husband before marriage, and gave him her hand without her heart. But we feel bound to say, upon a careful examination of all the circumstances attending this marriage, that this averment of the respondent, so constantly repeated, is a feeble attempt to excuse her subsequent misconduct by an assertion not warranted by the evidence in the case.

That the *parents* of Mrs d'Hauteville desired this union is true beyond all controversy. The remark of the relator, that the anxiety of Mrs Sears for the connexion seems to have transcended the ordinary limits of maternal solicitude does not seem too strong for at an early stage of his acquaintance, he certainly received warm encouragement at her hands, if we may judge, among other circumstances, from a note written by her to the relator before there was any engagement between him and her daughter.

"I congratulate you most sincerely, my dear friend, upon the happiness of again meeting your parents, after so long an absence, and am confident I need not assure you of the pleasure it will give us to make their acquaintance. Pray present us very kindly to them, and say, that we shall be delighted to receive them at any hour, that will be most agreeable to them. Ellen was too ill last evening, to go to Madame Montgomery's, or to remain up later than 9 o'clock, but seems better this morning.

"Believe me, dear Monsieur d'Hauteville,
with much regard, very truly yours, M. C. SEARS."

The relator, also, avers, that his younger brother was the unwilling confidant of the hopes and wishes of Mrs Sears. She spoke to him of the remakable union that existed in her family. Her sons in law were sons indeed to her, but nevertheless she loved the relator better than any of them; that he was superior to them in every respect, that she would always speak in his favor, not against him, and that a word from her would settle every thing. Nor are the motives of this extraordinary encouragement at all obscure, when it is known, that the respondent and her family supposed 'Monsieur Gonzalve was to come in possession of a *million of francs*, on the day of his marriage,' besides other expectations. When, however, it was discovered, that the relator was not so rich as had been supposed, the engagement, which had taken place between the relator and the respondent, was broken off, avowedly from pecuniary considerations. Before this unlucky fact became known, the respondent had not discovered that she did not love the relator, or that her parents did not favor his suit. Indeed, she says, that in accepting his hand, she thought she 'was fulfilling her parents' wishes.'

The relator was not as rich as he was supposed to be; but was not poor, and his property was not vastly out of proportion with that of his intended wife. He owned the reversion of the Hauteville estate, in Switzerland. He had, also, property of the nominal value of 250,000 francs, or about 50,000 dollars, yielding the nominal income of 12,500 francs, or about 2,500 dollars. The father of the respondent had created a trust fund, which was to accumulate until the end of the year 1849, from which the yearly income of her share, was computed at about 10,000 francs, or 2,000 dollars. To this he was willing to add as a portion, 20,000 dollars. But the father of the respondent was not satisfied, and several meetings took place, in which attempts were made to accommodate the pecuniary matters so that the marriage might take place; but the affair ended in what appeared to be a final rupture, and the father of Mr d'Hauteville wrote to Mr Sears a letter, in which he said: 'as it is equally out of my power to yield to your desires in either respect [an increase of settlement, or a consent to the relator's living in America] I am unfortunately obliged *to break off an union* upon which I had so much relied for our happiness, and consequently I consider it my duty to oppose the visits which Mrs Sears has had the kindness to permit my son to make.' And thus concludes: 'If I could have foreseen that financial considerations would decide the fate of the young people, I am sure I would have

been careful to prevent the affections of either of them becoming so far engaged, for in tender hearts and delicate souls there remains for a long time, and sometimes forever, a deep and painful feeling.'

Mr Sears being about to visit England, it was determined that the respondent should accompany him. Upon this journey, she admits that she was keenly alive to the impression, that her conduct would be misconstrued by others. She had accepted the relator when she believed him to be a man of large fortune, already in possession; ought she now to reject him because it had turned out, that his present revenues were small, in proportion to the expense of a European life, to a person brought up without a profession? Her own conscience replied in the negative, and she feared that she would suffer in the opinion of others by his rejection. She had much conversation with her father, who, on arriving at Grandvilliers, wrote to his wife the following remarkable letter, which she immediately sent to the d'Hauteville family, thus inviting a renewal of the negotiations.

The respondent avers, that her father misunderstood her feelings entirely. But whether his impressions written down at the time may not be depended upon more safely than her present recollections, cannot be a question of difficult solution:

"GRANDVILLIERS, 21st June, 1837.

"MY DEAR MIRIAM—During our day's drive I have conversed a great deal with our dear Ellen, on the subject so very interesting to us all. For the first two or three posts I spoke very little, and never alluded in any way, to the state of her feelings. At last she commenced the conversation herself, and I then questioned her very closely. I confess to you *I have been astonished* at the *deep, calm manner* in which she expresses herself, and at the strength of the impression made upon her heart. I put several cases to her, but nothing produced the slightest alteration or wavering. She seemed to have her own mind fixed, and waited only her opinion confirmed *by ours*. *I am sure*, that without our full acquiescence and approbation she will do nothing; but, with them, she is entirely ready to follow the fortunes of Mr d'H. Now, my dear Miriam, being convinced, that her heart is really touched, and believing in the firmness of the attachment, I freely and fully give my consent, and approve of her choice, and the longer I dwell upon the difficulties, which, at the first moment, taking us by surprise, seemed insurmountable, the less they become and are fast diminishing to nothing. We can do something, and I am sure the parents of Mr d'H. can and will do much, not by way of contract, perhaps, but by voluntary offerings and unexpected kindnesses, so soothing and gratifying to all, and more especially to a heart so tender and warm as Ellen's. Besides, is it probable, that a gentleman and lady of the character of the Hautevilles, known and distinguished as they are for all that is kind and amiable, so attached as they are to their children, so frank and loyal, and apparently seeking only to promote the happiness of their sons, and, no doubt, feeling as warm an interest in their success as we do in that of ours—I say, is it probable, that they would take the responsibility of asking a young lady, in the station and circle of our dear Ellen, to quit father, mother, family, friends, and country, and every previous attachment of home, to come to them, to live with them as a daughter, except they were well convinced that they had means to render her happy and comfortable—to see that every want was supplied, and that the situation which they offered was at least as respectable as that she quitted? And still more certain is it, that Gonzalve, with his high, and noble, and delicate feelings, would never think of putting Ellen, whom I really believe he loves better than his life, in any situation where she would have to struggle with privations of any kind. No, I feel certain, that if he were not sure of protecting her against every inconvenience

which mere money can obviate, he would not ask to marry her—he could not be forced to do it. He would not venture upon a chance in a cause so dear to him. Since I have told Ellen that I approve of her choice, and thus, *if you concur with me*, remove every obstacle to it, she seems more herself, is easy, and satisfied, and looks forward to her visit to Fulwell Lodge with pleasure."

In consequence of this letter, the negotiations were again renewed, but it was found, that the relator was even less wealthy than Mr Sears had supposed, and the treaty was again broken off. But it was soon renewed, the relator's parents agreeing to make up a certain sum, and the respondent's father agreeing to add to his daughter's portion. There was also considerable discussion in regard to visits to America, but so far as there was any real understanding, it was, that this matter should be decided by Mr d'Hauteville and his wife alone after their marriage.

This is a simple narrative of the circumstances attending this marriage, stripped of the extraneous matter so industriously connected with it. It thus appears, that the relator was a favored visitor in the family of the respondent, beloved in no ordinary degree by her relatives, and looked upon as a man of splendid fortune—an impression, however, which he had in no way contributed to form. An alliance with his family was much sought by the family of his wife; and her mother, in particular, exhibited a remarkable maternal solicitude upon the subject. His person was pleasing to the daughter. They soon became attached. The matter was helped on by the family. He offered his hand, and, as is not uncommon, was at first refused, but was subsequently accepted. When the marriage settlements came to be talked of, it was discovered that he was not the man of wealth he had been supposed to be. The engagement was then broken off, but was subsequently renewed at the request of the respondent's family—was again broken off, and again renewed, and the marriage finally took place. There could not be a more unfounded, we will not say wicked and disgraceful attempt, than that subsequently made, to represent the respondent as marrying from motives of duty to the relator; and the father, who wrote the letter from Grandvilliers, and the mother, who transmitted it to the relator's family, as not favorably disposed towards the alliance. So far, then, from there being any thing in the circumstances preceding the marriage to justify the respondent in separating from her husband, they all operate, in every view of them, directly the other way. The wife who admits, that for the husband of her choice she had no affection—that she did not love when she married him, is bound by every principle of humanity, of justice, and of religion, to make up by subsequent kindness and affection for the wrong she has done; and she can claim no immunity from reproach or suffering for abandoning him for causes of which the law, human or divine, takes no cognizance.

The marriage at length took place, and husband and wife retired to his paternal mansion, accompanied by her mother, who was to pass a year with the bride. Their prospect of happiness was certainly as

good as the large majority of marriages hold out, more especially those entered into with no better motives on the part of the wife and her parents, than they aver this to have been. We are not able to doubt a moment, that, *if they had been left to themselves*, they would never have exhibited to the world the miserable spectacle of a house divided against itself. There is nothing in their intercourse at Hauteville, or, indeed, in the whole time they lived together, that leaves room for doubt upon this subject in the least. What difficulties took place between them? What were the 'circumstances,' which the respondent avers 'occurred to disappoint the expectations of sympathy and affection on the part of her husband?' Why did she 'become inexpressibly wretched, by the conviction, that there was to be no mitigation of her sufferings?' There is a great deal of *mysterious nothing* on this part of the case. What were the real troubles—what the overt acts which justified her conduct? Nothing, absolutely nothing. The evidence may be searched throughout. The statements of the respondent and both her parents may be taken as literally correct, and yet nothing can be found to justify the harsh language used towards the relator, or which can excuse, in the eye of the law, the conduct of the respondent.

It is impossible to conceive of a more feeble attempt to bring reproach upon an honorable and kind hearted man, than this of the respondent and her advisers to convict Mr d'Hauteville of cruelty. Trifles, light as air—the slightest circumstances, which should have been forgotten before they were forgiven—the merest hasty word from which no man is free—personal peculiarities, which are not singular to Switzerland or to the d'Hauteville family—all, all have been brought together and digested, and no doubt magnified, with a diligence worthy of a better cause; and they all amount to just enough to make the whole thing utterly contemptible in a legal point of view. No court of justice in the whole world would for a moment entertain them as a cause of divorce. No code of laws, human or divine, would sanction a wilful desertion by the wife for such reasons. What reason had the respondent to expect extraordinary happiness from this union, which she admits she entered into with most improper feelings? How could she expect that love and affection which she acknowledges she herself had not, and from the man she had most grossly deceived in relation to a matter in which of all others he had a right to rely upon her truth and integrity? What right had her parents to complain if Mr d'Hauteville had treated his wife ill, when their motive in seeking this union was confessedly of a character which deserves, and can receive, no sympathy from those who look upon the marriage institution as something too sacred to be made subservient to vanity and pride? If this marriage was more a matter of bargain and sale with them, than of true affection; if their object was wealth, and they were also actuated by the poor vanity of a foreign alliance; they made an indifferent bargain, perhaps, and one from which they would have been glad to escape, but they surely had no right to expect a more than ordinary degree of

happiness for their daughter. Whatever may have been the difficulties between Mr d'Hauteville and his wife, it is not for the wife who married him from pity, or the parents who were actuated by motives far less creditable, to magnify these difficulties, or offer them in extenuation for subsequent misconduct.

It is, indeed, a matter of surprise, that there were not difficulties of a serious character. It seems to be one of the best uses of the institution of marriage, that it brings with it that attrition, which will expose to the light, evils which would else remain forever hid. It is a common enough remark, too, that the first year of a woman's married life is the most unhappy; and, making all allowance for exaggeration in the present case, this marriage will compare favorably, as it regards real troubles, with a large majority which take place. Consider, too, the fact, that the parties here were of different nations. Their habits, customs, education, from infancy had been different. Was there nothing in this to cause difficulties, of a trifling character, indeed, but still as great as actually took place? Look, too, at the situation of the parties. *Both mothers-in-law in the same family.* A favorite son, and a daughter unusually beloved, each very much under the influence of their several parents, and all beneath the same roof. Is any one surprised, that there soon existed jealousy of influence—fear of control—real intermeddling and irritating remarks? But the actual difficulties in the family were of such a trifling character as to give the assurance, that the young married couple would be carried through them safely. A little kindness and forbearance—mutual endeavors to do right, and, we will add, a little common sense, were all that was necessary in this case to overcome these troubles.

These 'circumstances,' which made the bride 'inexpressibly wretched,' are detailed at length in a letter to her father, and lest we may not succeed in giving an idea of how trifling they were, they shall be named. The first real difficulty appears to have been, that the husband expressed his dissatisfaction that his wife's mother should enter her chamber at evening, in passing to her own, to take her daughter's candle and bid her 'good night.' Then, the mother of Mr d'Hauteville annoyed the bride very much by her habit of constant caressing. 'It was exacted of me,' she says, 'to kiss her morning and evening, and I must endure it, on my side, many times during the day, which was extremely disagreeable to me.' Another overt act of cruelty is thus stated: 'One morning I found that my mother had sent for her carriage to return some calls; the weather was delightful, and I wished very much to go with her. I told Gonzalve I was going, and asked him in a kind manner to accompany us; but he objected to my going, and was angry with me on the plea that I had spoken improperly in French, in using the word *will* instead of *wish*, and after much dissatisfaction, it ended in my remaining at home, and passing the morning in tears.' Here is another 'circumstance' which was thought worthy of being brought to the attention of the court: 'One

evening Madame Zollikoffer came to tea, which she often did. I felt a headache, and asked my mother, when the rest of the party was in the music room, and G. singing, whether she thought I might go to bed, for I was sick and fatigued, she replied 'certainly, if I wished it,' and I went to my chamber. This caused great trouble to me, and additional coldness to my mother. G. was very angry, and thought my conduct very improper, and I passed an hour in very unpleasant altercation.' These instances are not merely a specimen of the 'circumstances' which occurred to disturb the harmony of the family at Hauteville; they are in fact about all that did occur which can be put in the form of a narrative. Other troubles there were, but they were the gloomy dreams of suspicion, which had been excited in the maternal bosom, or the wire drawn fancies of jealousy; not that

> "Green-eyed monster which doth make
> The meat it feeds on,"

but a jealousy which had the wife's mother for its object. It is not a little remarkable that all the respondent's complaints related in some way to her mother. Her sole and constant trouble seems to have been, that her mother was not treated with sufficient kindness or respect; a fact to which we shall have occasion to refer presently.

Who, then, were the persons that assisted to magnify these petty difficulties, and by their influence have been the cause of all this subsequent wretchedness? The relator does not hesitate to charge upon the mother of his wife the chief agency in sowing the seed of this dissension. This was a question of no importance any farther than it addressed itself to the discretion of the court in relation to the custody of the child; for if the averment of the relator is true, he might reasonably object to having his child in a situation where this lady would have a great influence upon its character, education and moral culture.

Now, it is true, beyond all controversy, that Mr d'Hauteville, soon after his marriage, conceived a strong personal dislike to Mrs Sears. The fact is admitted by this lady, although she professes herself profoundly ignorant of the cause of it. On one occasion she asked him in what she had offended him: 'He said he didn't know.'—'He said it was a dream, a cloud—*une songe*, *une nuage*.' Perhaps Mr d'Hauteville was unreasonable in this thing, and had no better reason to give than was offered on another occasion:—

> "I do not like thee, Dr Fell,
> The reason why I cannot tell,
> But this I know full well,
> I do not like thee, Dr Fell."

But the fact is beyond question, that Mr d'Hauteville was not pleased with the influence which Mrs Sears had over his wife. It is, also, indisputable, that the mother possessed a powerful influence over her daughter. It was in her power to fan or quench this flame of discord, in no ordinary degree. Mr d'Hauteville made a great mistake in this matter—a mistake which men often make who unwittingly

marry at the same time, a mother and her daughter. In his simplicity, he expressed himself, that 'people should be left to themselves after they were married;' also, that 'a young man wished his wife to himself,' which caused offence, as being entirely heretical doctrine. Mrs Sears was, apparently, a more important personage than the young husband was willing to admit. Mr David Sears, who might be supposed to be good authority on the subject, in a letter of January 12, 1838, to the relator, informs him, *long after the marriage*, that 'the surest way to gain her [Ellen's] heart, was *through the heart of her mother*'—'Be assured, also, my friend, that whoever pursues a different course, can never gain her.' Interesting information this, to a young married man; and Mr d'Hauteville evidently so regarded it by his answer, in which he expresses surprise, that after his marriage, *he had anew to conquer the heart of Mrs S.* It was, he said, a truth often avered, and too frequently confirmed by experience, that when the affection of a mother interposed itself between two young married persons, their happiness was singularly compromised; and never in his personal conviction *could he attribute to any other cause*, the extremely painful moments they had passed, both at Hauteville and Paris. 'Mrs S., as well as you, sir,' he says, with manly sincerity and truth, 'have given me my wife, by the ceremony of marriage, entirely, completely, and without restriction, relinquishing to me all your rights over her, which, permit me to say, *Mrs S. has never done*, perhaps, without knowing it herself.'

We take it to be plain, that Mrs Sears was anxious, we will not say determined, that Mr and Mrs d'Hauteville should reside in Boston a part or all of the time. There was considerable difficulty on this subject before the marriage. Neither Mr d'Hauteville or his parents would consider the proposition for a moment. An agreement was finally made, however, to the effect, that when visits were proposed, the relator and his wife should alone determine on the propriety of going, without the interference of others; she agreeing not to urge a visit when his duty, or any accident, or case of sickness should oppose. But it would appear, that after, and probably before, the marriage, different views were entertained by Mrs Sears. Martha A. Greene, who was the nurse of the respondent, and who has been in the family twentyfive years, and may, therefore, be supposed to have some knowledge of the character of the parties, testified to a conversation of her own with some of the servants at Hauteville, of some significance, to the effect, 'that Mrs Sears would never be separated from Ellen, but *would carry Mr Gonzalve to America, to live near her, as Mr Amory and Mr Crowninshield did.*' And Mrs Sears said to another witness, at Hauteville, 'I have made a great mistake, Ellen can never be weaned from me;' and in a letter, written afterwards, she says, that she and Mr Sears, who *alone knew all the circumstances*, had decided upon what course to pursue. M. Couvreu, a mutual friend of the parties, who had been appointed curator of the interests of the respondent, *in answer to a letter of Mr*

Sears, says: 'The marriage being once concluded, it became apparent to all eyes that Mrs Sears strove by every means in her power, to prevent the natural consequences. She counted upon the ardent attachment of a new made husband for his young and pretty wife, and on the want of energy she supposed in him. She thought that she should easily obtain sufficient influence over him, to compel him to leave his family and establish himself in America.'

Now, upon this state of facts, the natural and legal inference in relation to the person who is, in a great degree, responsible for all this trouble, is perfectly plain. Add to this the fact, before alluded to, that Mrs Sears was in some way or other always connected with every difficulty, great or small, between the relator and his wife. It was the *mother* who was treated ill, and not the *wife*. The wife suffered, not from any ill usage towards herself, but because the mother was not loved. When Mrs Farrar, one of the witnesses, was at Hauteville, all appeared happy and cheerful excepting Mrs Sears. Immediately after tea they had music, singing, and playing on the piano. One of the guests sang, and Mons. Gonzalve with her, after which the young people waltzed, and Gonzalve waltzed with his wife. She saw nothing calculated in the least to wound the feelings of Mrs Sears or account for her depression. Mrs d'Hauteville, it is true, constantly denies that her mother exerted any improper influence over her; and the latter is equally positive in this particular. But it is not probable that the wife was aware of any 'malign influence,' and the mother being in effect a party in this controversy, her averments are entitled to no more weight than those, equally positive, of the relator.

Upon the whole, we do not hesitate to express our belief, that here was the most unauthorised interference with the rights of others, and the most singular attempt to accomplish an unworthy object by improper means, that we ever heard of among people who make any pretensions to the decencies of life. It deserves the severe condemnation of every friend of morality who respects the rights of others, and should be visited with the withering scorn of the whole community. We confess our astonishment, that the court, if they went out of their way at all to comment on these facts, should have spared a rebuke which would not have been forgotten. We come to this conclusion from the facts in the case, and not from the positive averments of the relator, made under the sanction of an oath. He does not hesitate to charge Mrs Sears in terms direct and positive:

'That Mrs Sears had early conceived the plan of inducing the relator to live near her in New England, he has no doubt. That on her disappointment in not succeeding in this, she determined to take her daughter back, he is equally assured. It is no vague suspicion or idle jealousy which induces this belief; the whole course of her conduct at Hauteville explains it. Of that conduct the full proof will be made to your honors. It was not mere general disquietude; but commencing with ill-defined restlessness, it very soon matured into open and offensive complaint. Not content with engrossing the time and con-

versation of the respondent, so that neither her husband nor family had more than casual opportunities of intercourse with her ; not satisfied with the omission of all attempts to reconcile her to her new home, she lost no opportunity of deriding Switzerland, deploring her daughter's marriage, saying publicly, she wondered she had ever been such a fool as to consent to it, and declaring that Ellen never would or could become reconciled to it as a home. The respondent, who in the morning would rise cheerful and happy, would, after a visit to her mother's room, appear melancholy and distressed. The attention of the family had no effect ; the acquaintance of the neighbors was cultivated, but in vain ; the innocent gaieties of society were encouraged, but to no purpose ; the mother of his wife stood petulant and discontented amidst the gaiety, and resolute in her determination to attain her purpose—by rendering the relator's home hateful to him, and to induce him to seek another.'

The first publication of the troubles between Mr d'Hauteville and his wife, or his wife's mother, was made by the flight of Mrs d'Hauteville to the house of the American minister at Paris. The mother and daughter were desirous to go to the United States together in order that the accouchement of the latter might take place there. The relator at first consented to it. But subsequently, on account of the severe illness of his father, being unable to accompany them, he revoked his consent. He came to Paris where his wife then was, and sent her a note, saying that he would call for her at an hour named, to return with him. At the suggestion of Mrs Sears, she immediately took refuge at the American minister's, on the ground that her husband intended to apply force, an idea which was at length abandoned, and she returned to her mother's home with her husband. This step, by which the whole affair became known to the world, is full of significance. There was nothing in the letter of Mr d'Hauteville, that justified this extreme measure. Mr Francis C. Gray, a witness of the respondent, was in Paris at the time. He saw Mrs Sears and Mrs d'Hauteville after the note was received and before the latter had gone to the American minister's. He told them he had no idea that Mr d'Hauteville intended to use force. The respondent avers, that on the receipt of this letter she had no alternative left, but to write as she did, instantly, the following short note, *in pencil :* 'I remain here. Nothing on earth but *force* shall induce me to go. Oh, Gonzalve, is your conscience at rest ?' Now it so happens this note was written in substantial *ink*, and *a copy was kept.* Surely there was 'method in this madness.'

The relator avers of this affair, that 'it was intended as the accomplishment of a design, by this very publicity and its natural exasperation, to place an insuperable barrier between him and his wife.' If this was the case, it did not fully succeed, for by the proper interposition of the American minister, an interview between the husband and wife produced a reconciliation, and Mrs d'Hauteville returned to her mother's with the relator. He avers that he

had well founded objections to his wife's visiting the United States at that time, not the least of which was, that he feared to trust her away from himself under her mother's control. He had other causes of uneasiness in her then situation, unfit as he was led to believe, in safety to cross the ocean; and it was surely nothing very extraordinary or evincing a cruel disregard of his wife's wishes, that a husband should strongly object to her crossing the Atlantic a few months after his marriage, at a time when he was unable to accompany her, and when she was shortly to pass through a peril when he would naturally have a strong desire to be with her. It might have been better, if in her peculiarly delicate situation, nervous and enfeebled as she was, her wishes had not been opposed in the least, but there was nothing very extraordinary in her husband's conduct, and nothing to show that he was actuated wholly by selfish considerations. On the contrary, after he had consulted with Dr Warren, who happened to be in Paris, and who earnestly advised him to consent to his wife's wishes, he assented to the reasonableness of the advice, and seemed to have but one solicitude, lest the voyage might be attended with some risk in her then condition. He accordingly accompanied his wife to Havre, and went on board ship with her, taking an affectionate farewell. At this time, the respondent admits that she had no design of deserting her husband; and immediately on her arrival at New York, she wrote him the following letter:

"New York, June 12, 1838.
"Astor Hotel,

"We arrived here, my dear Gonzalve, yesterday morning, and this afternoon shall leave again for Boston. I have but a moment to write you a few lines, as I was unwilling that you should hear of our arrival without a word from me. We made the passage in twentyfive days, although we were within two days sail of New York *in less than fifteen;* but there our good fortune left us and contrary winds made us much longer in arriving than we expected. Far from losing, I think that I have gained strength from the sea air, and do not feel that great weakness which troubled me so much in Paris. But perhaps it is the warm breath of my native shores which revived me, for you can little understand the dreadful feeling of *home* sickness. We did not find the Louis Philippe as comfortable as we imagined. The ship, however, was a very fast one, but the cabin was dirty, the provisions bad, and the passengers not agreeable. I *do not* advise you to select it in preference, but I should prefer to have you go to England. My father was not able to meet us here; his knee still troubles him, and he is obliged to be very careful in using it. The physicians entirely disapprove of his attempting to meet us here, so that he sent Mr Crowningshield in his place, who came on board ship in a small boat. He expressed much regret at not seeing you here, and my sisters both anticipated much pleasure in making your acquaintance, and spoke of you very kindly. The sail up the harbor was very beautiful, and I longed to have you with me, dear Gonzalve, that you might see America for the first time under such delightful auspices. The verdure is in its greatest beauty, and the air seemed perfumed with a thousand flowers. Our acquaintances here have been very kind, and we have just been sent a *free permit* for all our trunks to pass the custom house without examination, which is very difficult to obtain; and they all welcomed us *so* cordially, that it really does my heart good; for I have been so long among strangers. The heat of the weather is excessive, and the thermometer at 95, so that it is impossible to go out until sunset. I imagine you now, dear Gonzalve, at Hauteville, enjoying all that to you is so delightful, for it is a beautiful season of

the year. I can easily understand your attachment to all that belongs to Switzerland, for even the sky seems brighter and the trees greener in our native hills. Jane, the stewardess, gave me your letter the day after we sailed, and it was a great pleasure to me, for it was very kind and thoughtful of you. Your little book I shall read very often, and hope to receive comfort from its instructions. I fear you did not receive the Testament as soon as I thought, for I find that Mr Gray intended returning to Paris for a few days. Mother and Cordy send their love. Cordy desires me to say, that she does not forget her promise of writing, but shall certainly do so when I am prevented. Adieu, dear Gonzalve. I am much hurried, and my hand trembles. I shall wait with impatience for your first letter, for I hope that you will not forget your pauvre petite femme."

Her next letter, written a few days after from Boston, is truly in mysterious contrast with the one written but sixteen days before:

"BOSTON, JUNE 28, 1838.

"MY DEAR GONZALVE—I feel that the time has arrived when we must understand each other; and, now, under the protection of my father's roof, and no longer restrained from expressing my sentiments, by the fear that further opposition would still be made to prevent my return to my own country, I wish you to remain no longer in ignorance of my intentions. Your conduct during the last year has deeply wounded me, and your entire disregard of my wishes and feelings has often caused me to doubt the sincerity of the affection you expressed. I am decided that I never can return to Hauteville. By Madame d'Hauteville's unkind and neglectful conduct *towards my mother*, by her cruel treatment of myself, in promoting a plan to force me, against my will, from Paris, and by advising the breaking of a solemn promise which was made me, before marriage, and on which she knew my consent depended, she has caused my return to her house impossible. Your father refused to see me in Paris; your mother reproached me with killing him; you constantly accused me of not performing my duty—and why? Because I claimed the fulfilment of a promise, given me to return to my home and my friends, to pass through moments of trial, and which could never be urged, with greater force, at any future period of my life. You knew I was very weak, and that the agitation of my mind might produce the most fatal consequences, but my feelings you little regarded. I cannot willingly believe that you even originated a plan to deceive one, who was so entirely in your power. It is a painful thought; but still in calmly reviewing your conduct, it often forces itself on my mind. I assure you, both my parents, and myself, considered the promises, which were made me, with regard to America, as solemn and sacred as if they were written in the marriage contract, and I entirely believed that it was agreed between us, that I should return, when, and as often as I pleased, and that, at all events, no third person should interfere to prevent me. And were not these promises all broken? I sometimes think you never intended I should at any time return. Where then can I place my confidence? You allowed your uncle to dictate a letter which drove me in terror from my mother's house, and obliged me to seek the protection of the minister of the United States—From whom? Alas! from one for whom I had given up my friends, and home, and country. You afterwards repeatedly assured me that you had done nothing but your duty, and even had you the part to perform again, your conduct would be the same. Is it possible, I can ever forget your desertion of me—and at such a moment? You must be aware that my parents are excluded from ever entering Hauteville again. To me, each stone, each tree, is associated with the most painful thoughts; and how could it be otherwise? *Did I not see my mother treated with coldness and neglect?* And did I ever deceive you, as to how deeply and dreadfully it wounded my feelings? But did I not certainly express to you, the effect it was producing upon me? Was there not an attempt constantly made to separate me from her, and my happiness injured in every way? Remember the tears you have seen me shed there, and recall the hours of misery, that I have spent within its walls, and you will not be surprised that I shrink with horror even from the recollection.

"You deceived me with regard to Geneva: it was never our understanding

that we were to live there; nor would I have consented to marry you had I known it to be yours. I always believed it agreed between us, that Paris should be our winter residence. You told me you preferred it. Why did you thus mislead me? Was it unknowingly? You must be convinced, after the late occurrences, I cannot put myself in a situation for their renewal. The influence of your mother over your mind is too great to allow me to make your home a happy one, while she is continually interfering, contrary to my wishes, as she has shown me would be the case. I do not feel it my duty to return, where I could neither promote your pleasures, or find life supportable. I have made many sacrifices for you, and in return I looked for kindness, sympathy, and protection from every sorrow and trouble which you could avert. I have been disappointed—still I do not intend to reproach you. It is true my health has sunk beneath the shock. My happiness has gone; but, believe me, it is under the influence of no angry or excited feelings against you, that I take this step. I consider myself cruelly injured by your own and your mother's conduct towards me and mine; but, still, I would willingly spare you the pain you have so often caused me. I have reflected long and deeply upon these measures, and I am convinced that I can take no other course. I shall be firm and decided in this. I am unwilling to think of any other mode, while an amicable adjustment can be made; but under present circumstances, does it not appear to you most judicious, to remain in your own country until some final arrangements are made, which may be mutually satisfactory? Would it not be painful to us both to meet again, until this load of care is, in a degree, removed from my mind? I entreat you to think seriously upon what I have said, and, for your own peace of mind, be not quick or hasty, but reflect calmly upon your conduct, and recall the various causes of unhappiness which have occurred during our short married life. Farewell, Gonzalve, I leave you to decide upon our future destiny. I shall always hope for your happiness, in whatever course you may adopt; and I cannot but think, that you will consider how much I have suffered, and endeavor to make some arrangement that will leave me, in future, more tranquil. I shall write you again in the course of a short time, when my strength will allow me, but I am weak and feeble. Affectionately yours,

"ELLEN S. D'HAUTEVILLE."

The respondent avers, that at the time this letter was written she had no purpose of a final separation from her husband; but she had come to a determination not to return to him unless some arrangements of a satisfactory nature should first be made; and the most important to her was, that she would not reside at Hauteville. A letter was subsequently received by her father, however, from Mr d'Hauteville, (dated July 24, 1838,) which made her determine never again to live with her husband. This letter, upon which so much stress is laid, appears to be nothing more than a frank and somewhat sturdy *exposé* of the writer's views in relation to his domestic concerns, in which he gives his opinions upon matters relating to himself and wife in a kind but firm manner. He expresses his determination not to pass much time in Paris, which city, he says, 'is not the place for a young couple just beginning the world, except as a journey; it has too great a variety of dangers. Geneva is called a city of true domestic happiness by all those who know the place. You would not desire, sir, the responsibility of fettering me in an object so serious, and which, besides, concerns me alone. Teach my wife to conform to the views of her husband, rather than to set herself in opposition to him. Is not Ellen my wife, or do you wish she should be so only in name?' He goes on to say, that the friends who seek her happiness and pleasure

to the detriment of her duty, render her but poor service; and he declares, that the tenderness he feels for his wife, will never allow him to bear any one to dictate to him the place or the manner in which he chooses to live. He intimates, that when his wife returns to him, he shall desire that of every thing she may be able to unbosom herself to him alone; and he desired that she would not bring with her the old family nurse. He declares, that he mistrusts the authority and influence, well known, and generally troublesome in households, of old servants, and above all of a nurse.

That this letter of itself should have had the effect to make a wife determine to live separate from her husband, must seem extraordinary and inexplicable, were it not for the circumstances which precede and follow it. But if here was a design, deliberately planned and matured, to break up this marriage unless the husband would yield certain points; then is the effect produced by this letter nothing strange, as some time must be chosen, and some occasion taken for the consummation of that design; and this letter may have been seized upon with the moral feebleness which characterizes all the acts of this drama, as a good apparent cause for a separation.

Again; the struggles of an affectionate sense of duty, not yet extinct in the young wife's bosom, may have been too strong thus far, for her to yield to the influences opposed to her husband; and this letter may have been so presented to her mind, agitated and torn as it was by conflicting emotions, as to convince her that the last link was broken which bound her to her husband. She might have really supposed that here was enough to justify her in the course she adopted. But to those who look at all the circumstances, no other evidence is needed of a 'power behind the throne,' than this letter and its effect.

And we here obtain light upon the constant averment of the relator, that a design was early formed to compel him to pass a part or all of his time in Boston. If there never had been any design of this sort; if there was no desire to interfere with the domestic affairs of Mr d'Hauteville, why should this letter have given offence? But if, on the other hand, the positive averments of the relator on this point are well founded; and if this letter evinced a firm determination, that he would never allow any one to dictate or advise him as to the place or manner in which he should live, and in a tone, too, from which it could be inferred with certainty, that he would never alter his mind, then is the effect produced by this letter not in the least surprising. Negotiations might as well cease. The hope of living in domestic peace need no longer be held out; and no farther efforts need be made to turn from the error of his ways a husband who was so obstinately blind to his own best interests; and that step should immediately be taken which would at once make him conscious of his mistake, and of the power which was held over him.[1]

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[1] The suspicions of the relator on this subject are somewhat justified by the dates of some of these letters. On the 12th of June the respondent wrote the kind and affec-

From this time every means seem to have been taken to prevent the relator from obtaining his just and legal rights; and to convince him that he was to have no influence over the guardianship of his child. No one in Boston informed him of the birth of his son. His wish as communicated to his wife was, that the child, if a boy, should bear the name of Aloïs, a name dear to every citizen of Switzerland; and that it should be baptized in the religious communion of its father, both of which requests were disregarded. Nor were small means neglected to widen the breach which unhappily existed between husband and wife. Mr Sears, in a letter to M. Couvreu, after expressing himself, modestly, as having little doubt, that Mr d'Hauteville would be willing to make an amicable and quiet settlement, and allow his wife to remain in Boston unmolested, says; 'should that not be the case, however, *you will* THEN please to inform him, that we shall, on the day of his arrival here, commence an action and *demand a separation in our Supreme Judicial Court.*'

But neither the hope of peace, nor the terrors of the 'Supreme Judicial Court' were enough to deter Mr d'Hauteville from insisting upon his rights, and on July 12, 1839, he arrived in New York, and immediately proceeded to Boston. On his arrival there, he went to the house of Mr Sears to see his wife. She had been at Nahant, and on hearing of his arrival in New York she immediately departed for a place of concealment. He left a note and his card for her, but no answer was returned. His counsel then requested an interview with Mr Sears, which was first promised, then declined. The subsequent correspondence between Mr d'Hauteville and his wife, passed through

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tionate letter from the Astor house, New York; on the 25th of June, after her arrival in Boston, she wrote the letter (copied above,) to her father, *while they were both under the same roof*, in which she details her grievances, and on the 28th of June she wrote to her husband her second letter, which we have also copied above. The contradictory feelings manifested in her first and second letter, are too apparent to require comment, and it is worthy of remark, that the letter to her father was written between the two. Was there a consultation immediately on the arrival of Mrs d'H. in Boston, and was this letter to her father, written when they were in the same house, to which she referred her husband on his arrival, and which was carefully preserved and spread before the court, something prepared in the nature of a deposition *in perpetuam?*

We desire to add, in this connection, that the letter of Mr Sears to Mrs d'Hauteville, just after her marriage, is highly honorable to him as a father and a man. If *his* excellent advice had been followed, it would have been better for all concerned. 'It will be necessary for you, my dear Ellen,' he says, 'daily to discipline your mind, in order to reconcile yourself to what is new in your position—to new thoughts, habits and expressions; to new companions and a different mode of life. There is often much good in what may at first appear strange. Your gentle disposition is easily satisfied, and assured that all is done in kindness, will soon accommodate itself to the wish of those around you. They all love you—they all are really anxious to have you pleased and satisfied; and though injudicious, perhaps, in some of their attempts, yet, with you, I am sure, the benevolence of the motive will compensate for any dislike you may have to the act itself. No human lot is without alloy. Life is made up of day and night, of sunshine and shower, and the only place to look for happiness is in the heart itself. If that approves your course, God tempers all the rest.' This letter also shows that the writer was highly pleased with this alliance. He says: 'It is a pleasure to me to think of the excellent qualities of the family you have entered, and that your husband, whom I in all respects approve of, loves you far beyond the common love of man.'

the hands of the respective counsel, it being impossible to discover her retreat, her letters containing no post mark, or any thing to indicate the place from which they came. In his letters he earnestly and eloquently urged her to see him and return to him; but all in vain. She expresses a determination never to live with him again. In her letters, which are really eloquent in point of style, and give evidence of a highly cultivated taste, she implores him to pity her, and disturb her no more. In regard to the child, she says:

"No power on earth shall separate me from my child. It is weak and feeble, and night after night have I watched by it, and suffered for its sake; and by the affection you once expressed for me, and in which I so surely trusted, I beseech you to spare me further trials. Believe me, I wish you no ill, but hope most sincerely that God will bless you with a happier fate than can ever be mine. Happiness I shall never know again; and all my earthly prospects, which a few years since seemed so fair, are darkened, never to be bright again! You alone can restore me to tranquillity, by ceasing to pursue my child; but be assured that in whatever situation I am placed, I shall never leave it. My only care is in watching over it—my life is in its happiness."

In what appears to be Mr d'Hauteville's last letter, he earnestly beseeches his wife to return to her duty. He expresses his desire to avert from her as well as their child, the miserable consequences which inevitably would follow this conduct if she persisted in it. In regard to her wish to be permitted to keep the child, he says:

"There is a duty resting on me as a father, as a Swiss, as a member of society, which leaves me no alternative. I ought to do what I can to watch over his education, *whether for this life or for the other.* He is the natural heir of my patrimony; he is destined, therefore, to enjoy, in his country, a position which he cannot find elsewhere, and only if he is educated there: *I am surprised that you should wish to deprive him of it.* I am not disposed, too, not to enjoy it, and I feel that I have need of some consolations, and wish no longer to see the most sacred rights of nature thus violated in my person. It is not accordant with my views, to leave the moral and religious education of my child in other hands than my own. No, Ellen, this cannot be. I must soon receive my child, if it please God, but I do not desire to take him from his mother. Happy, if that mother would recognise her fault, and put herself in that position that I may receive her again as I desire. If separation ensues, it is not I who have done it: it is by no fault of mine. I would add, that it would be well to make a voluntary sacrifice to your duty and your obligations, in the fulfilment of which you will ever find the sweetest, if not the only, happiness. As to my incontestable legal rights in this respect, I am assured of them by all, and they are clearly recognised by your friends, as I understand. The idea of a permanent flight on any arrangements whatever, is equally irrational, without taking into account the state of perpetual suffering which would be attached to it. Neither days, nor weeks, nor months, nor years, nor constant efforts, could induce me to change my determination in this respect. It is so positive, that if to regain the child it is necessary to claim the mother I shall not hesitate.

"I write you this letter with pain, Ellen, thinking of yours in receiving it; but I have thought it my duty to speak to you, once more, the language of affectionate remonstrance and of warning. May God open your mind and heart to perceive your position and your duties, in their true aspect, in order that a return to them may reunite us, and give us that holy happiness, which we are still fitted to enjoy for it is always possible. I have but one thing to add. If you have thought Ellen, that there would be humiliation in returning to me and to us, this is an erroneous idea. A return to duty is never degrading; and every religious person

will respect you the more, if you make the sacrifice of a mistaken sentiment, in all which is necessary, on the altar of domestic duties and christian meekness."

With this letter all direct negotiation ceased on the part of Mr d'Hauteville, and he determined to try his legal rights. Process was prepared in Massachusetts, but no service could be obtained on the respondent in that state. At length she appeared openly in New York, and then the father was permitted to see his child, but always in the presence of two lawyers. Mrs d'Hauteville afterwards took up her residence in Philadelphia, for the express reason, as stated by Mrs Sears, that her family considered the laws of Pennsylvania more favorable to the preservation of the child in this country than the practice in Massachusetts—their confidence in the 'Supreme Judicial Court, being less, apparently, than at a former period, when Mr Sears threatened to 'bring an action' in it, on Mr d'Hauteville's arrival in this country.

And now, having brought this narrative down to the period when the matter was placed in the hands of the law, it may not be improper to refer to the conduct of Mr d'Hauteville in these domestic tribulations. This is ground, however, upon which we venture with caution, because there is no pretence that his conduct has been such as to furnish ground for a divorce, and any thing short of this had no relation to the point in controversy. The wife stood in a different position. She came before the court in a condition which the law does not favor, and it was deemed necessary for her to justify her conduct by an appeal to the facts attending her marriage and separation from her husband. But lest we should seem to overlook the conduct of the husband entirely, we venture a word or two of comment. We repeat an observation just made, that this evidence discloses nothing, which, in a legal point of view, can excuse the wife; and so far as overt acts of cruelty are concerned, we can find nothing that will justify the acrimonious language which is used towards the relator. We doubt whether a large majority of men would appear as well as he does, if all their most private actions, thoughts and remarks for the space of nearly a year were collected together and detailed with great care and no little ingenuity. If 'no man is a hero to his valet-de-chambre,' it is equally true, that no man will appear to advantage if his wife undertake to publish all his weak points, ascertained during the first year of marriage. At the same time, it is not intended to deny, that Mr d'Hauteville, like all mankind, had some disagreeable traits. These proceedings show that his knowledge of the world was limited, and that he was to a considerable extent, destitute of that liberality of sentiment and feeling, which would have been of more use to him in his domestic troubles than all the advice he ever received from his mother or Madame Zollikoffer. It is impossible to doubt, that he had a wilful determination on some minor points, which may have rendered his manners somewhat disagreeable; and he was wanting on some occasions, perhaps, in that nice and delicate sense of propriety which characterizes the true gentleman. His notions of the

duties of a wife may have been correct in the abstract; but it is evident enough, that they were explained and enforced at a time which was inappropriate, and in a manner which may have been offensive. His proceedings at Paris, when his wife fled to the house of the American minister, although they did not justify this measure, were still of such a character, as a high minded and manly self respect would scarcely have suggested. But all this proves nothing more, than that Mr d'Hauteville partook of the infirmities that belong to our race; and a fact should be mentioned here, which is not referred to in the opinion of the court, namely, that all the evidence which Mr d'Hauteville had caused to be taken in Europe was rejected by the court upon a technical point of law, and a continuance which was asked in order that he might have it taken over again, was denied.

But the conduct of Mr d'Hauteville since his wife's desertion has been such as must commend itself to the good opinion of all. He has proved himself to possess the feelings of a kind husband and a good father; and to have been actuated by deep religious principles. He used every means in his power to persuade his wife to return. He pursued her with entreaties both for his sake and her own to forget all former differences. When his words of kindness were answered in bitterness, he did not reply in the same tone; and in many circumstances well calculated to drive a stranger and a foreigner into improprieties, he did not forget himself, or his true position in a single instance. He has exhibited a calm forbearance, a mildness and a sense of propriety, which is worthy of all praise; and were it not that he has pursued this matter with a resolution and determination which exhibit great firmness of purpose, his character would almost seem to be destitute of proper manly energy. It is worthy of remark, too, that in his letters to his wife, since his arrival in this country, he has made no concessions which could lessen him in the eyes of the world. He would hear of no compromise which was to separate him from his wife and child. He would do nothing to impair his rights as a husband and a father; he would listen to no propositions which were to affect his domestic duties; he refused any personal intercourse with his wife's family while he was not fully acknowledged as her husband.

Nor did this sense of propriety forsake him in the proceedings before the court. Although his 'suggestion' and 'further suggestion' were undoubtedly prepared by his legal advisers, the tone of them may be regarded as his own. Throughout the whole he breathes the most anxious desire for his wife to return to him. He makes no accusations against her. He attributes all her actions to evil counsel. This is in marked contrast to the course taken by his wife,[1] or her counsel; and

[1] Some parts of the return of the respondent which relate to Mr d'Hauteville's religious and domestic peculiarities, are in exceedingly bad taste; and other sarcastic remarks call to mind circumstances which would provoke a smile in a less serious matter. The marriage of the parties, it will be recollected, took place on the 22d day of August, and Mr Sears in a few days left for Boston. On Friday morning, October 20th, the following announcement appeared under the head of marriages, in the Boston Daily Advertiser:

in relation to the sarcasms and the invectives contained in her 'return,' he remarks with great beauty: 'If the unhappy counsels of those, on whom the responsibility of this whole affair rests, have so far prevailed as to make the respondent believe, that the harsh feelings she now manifests to her husband are justified and deserved, bitterly as he may regret it, he cannot consent to be seduced into a warfare on the records of this court with his wife, but remembering as he does, that the eye of the child, whose custody is now the subject of controversy, may rest on the sad record, when neither party shall be here to tell the tale of mutual grievance, he is resolute in his determination, that one parent at least shall be free from the reproach of using harsh invective, or wanton sarcasm, where their object is a female, a wife, and a mother.'

We now come to the decision which was made by the court, after much time had been occupied by an examination of the evidence and the arguments of counsel. And here we take occasion to remark, that the case was conducted on both sides by a zeal and ability commensurate with its importance. The 'further suggestion' of the relator, in particular, we consider to be, in many respects, the best specimen of legal eloquence that it has ever been our fortune to read. It is not too much to say, that it compares favorably in point of style, and a clear exposition of the bearing of minute facts, with the masterly judgment of Sir William Scott in *Evans v. Evans*, (1 Haggard 35.)

In this connection, we cannot forbear the expression of a deep regret, which we confess is increased by reading the volume before us, that the very eminent legal advisers of Mr d'Hauteville thought proper to select the court of general sessions for the hearing of a case of this magnitude. Without intending any disrespect to the members of that court, of whom, as individuals, we have no knowledge, we do not hes-

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"In Montreaux, Switzerland, on 22d August, M. Gonzalve d'Hauteville, of Hauteville, officier de l'etat Major Federal, and eldest son of Baron d'Hauteville, to Miss Ellen, daughter of Hon. David Sears, of this city."

Never was there such a falling off of honors, respectability, and wealth, as in the case of Mr d'Hauteville! They have been literally blown away by the breath of domestic tribulations. From a 'young man of respectable family who was to have a million of francs on the day of his marriage, besides future expectations,' he descends to be the owner of the reversion of one hundred and fifty acres of land in Switzerland, and a regular wife hunter. From the 'eldest son of Baron d'Hauteville,' he becomes the son of a Mr Grand, who 'resides on an estate called Hauteville, in Switzerland. and who, *if he had lived in France*, would have been entitled to the name of Baron, a mere titular distinction, attended with no privileges or advantages, personal or political, there or elsewhere.' 'He had no right even to the *name*, which, however, was given to him by courtesy, in France, because the patent, under which it was held, contained a condition which had never been complied with, requiring the residence of its possessor in France. *In Switzerland, the title for any purpose, even by way of courtesy, never was assumed or given!*' But the unkindest cut of all, and the greatest falling off, is in Mr d'Hauteville's military character. From an '*officier de l'etat Major Federal*,' he becomes a 'lieutenant in militia, in which he was obliged to serve a part of every year.' We cannot help asking if Mr d'Hauteville senior, or Mr Grand, had no right to the title of Baron in Switzerland, and a doubtful right to it in France, even by courtesy, how he got it in Boston? The whole thing is disgusting. Who can wonder that our republican institutions are despised in Europe, from the specimen of our population who make 'foreign tours?'

itate to say, that neither their judicial station, or their customary and appropriate duties peculiarly fitted them to determine a question of tha grave importance here presented. There are certainly tribunals in Pennsylvania, whose character alone would have given a weight to their decision, which neither the reputation of this court, in general, or its conduct in this case have been able to effect. A case of more importance seldom arises. The parties occupied an exalted station in society; and the public mind was deeply excited. Most eminent counsel were retained, and yet a tribunal was selected of whose existence a large proportion of the legal world were ignorant, and which has emerged from its insignificance by making one of the most extraordinary decisions of the age; which is calculated to exert a greater moral influence for good or evil, than any decision ever made in that great state. Moreover, a right decision in this instance demanded great courage and nerve, and inferior courts do not feel that responsibility to the profession which is expected in superior tribunals, whose decisions are reported, and involve the personal reputation of the judges. Such tribunals have too much at stake to permit a suspicion of having acted from improper motives in their determinations; and we never expect to hear *them* set up with flippant confidence their '*discretion*,' in cases and under circumstances, where the most learned judges that ever lived have shrunk from interposing their wishes or views against the plain dictates of the law.

Our regret on this subject is not diminished by an examination of the opinion itself. Without, at present, being willing to attribute to the judges any grossly improper motives, we think that, *ne sutor ultra crepidam*, may be remarked of and to this court with entire propriety. They may fulfil their appropriate duties well; but we are very sure that cases like the one under consideration, involving most important principles relative to social life and domestic rights are not in *their* line.[1]

The tone of this opinion is worthy of some attention. It was evidently prepared for popular effect, and there is throughout a disposition to color the facts, which is so evident, that many will not hesitate to style it *unsuccessful* judicial quackery. There appears to be an overstrained attempt to compliment one of the parties in this case, which is not merely in bad taste; it shows how far a judicial tribunal must descend to pay its humble respects to one of the parties litigant, and such extraordinary efforts would, in other times, be extremely apt to give rise to a suspicion, that the court were determined to shape their law to their personal desires. We have Mrs Sears as a 'peacemaker from the first moment of dissention to the final separation'—'a mother anxiously striving to soothe the

[1] It is not in our province to speak particularly of this decision as a literary production. But this termination of a case to which public attention has been called so long, and in which so much forensic ability has been displayed—this result of a three months' labor, calls to mind that ancient labor, which, as it seems to us, produced a not dissimilar result—*parturiunt montes, nascitur ridiculus mus.*

incidental irritations of those in whose fate she had so much reason to be deeply interested'—'an amiable lady, yielding every consideration of mere self to the promotion of the comfort of those around her.' 'A traduced and much wronged lady.' Then, we have 'that moral tyranny, *so happily described by the father of the respondent.*' There is one remark, which we feel curious to have explained. It is said, that 'Mrs Sears has not hesitated, despite of the legally hostile attitude in which unhappy circumstances have placed her, to pay a proper tribute to whatever qualities of excellence he may possess; *and has answered every question upon the subject with her accustomed frankness.*' That is to say, a witness who was duly sworn to tell 'the truth, the whole truth, and nothing but the truth,' did not hesitate to do so.

——— "Is 't possible to show
Meet gratitude for such kind condescention!"

But what is meant by Mrs Sears 'accustomed frankness?' Do the court refer to her general character? If so, we should be glad to know what the court of general sessions or any other tribunal knows, *judicially*, of witness's private characters? Nor is this all. The court not satisfied with lavishing compliments upon Mrs Sears, which, in our apprehension, the evidence no where justifies, make assertions or inuendos against the other party, which are undignified, not to say contemptable. And they say not one word of the fact, that all the European evidence taken by Mr d'Hauteville was excluded upon a technical point of law, and a continuance, which was prayed for in order that it might be taken over again, was refused. Their opinion, which appears to have been furnished to the public prints as soon as delivered, and which purports to contain an impartial statement of the facts, has no allusion to that fact, so important to the relator, that his evidence was almost entirely excluded by the court. These considerations may not be considered of importance any farther than they show the character of the tribunal which decided this case. The evidence as detailed in this volume, is the best commentary that can be made upon these random assertions in relation to the parties.

Before reaching the main point in controversy, the court found it necessary to make a most extraordinary intimation, namely, that a wife may be justified in taking the step of final separation from her husband for such misconduct on his part as will not furnish good legal grounds for divorce. We are at a loss to know whether they mean this as an expression of their individual opinions or whether they intend it as a judicial *dictum*. We have a right to presume the latter, and it seems to us to be as unfounded in law as it is pernicious in morals. This is the first instance that we are aware of, in which a court of justice has undertaken to justify those who live in open violation of the marriage vow, or to weaken that bond which binds husband and wife together.

We should be glad to know what this court think of the *religious* obligations of the marriage covenant; or how they would expound the

doctrines laid down by the great Law Giver himself upon this subject. We are curious to understand, also, where this legal intermediate state between marriage and divorce is. Upon what moral map is it laid down; and what are its boundaries? Where does it begin and where end? What degree of domestic discord will justify a wife in escaping to this debatable land? Or is this also to be left to the 'discretion of the court under all the circumstances of each particular case?'

To our legal readers we need not remark, that this doctrine is not merely false in point of law; it is the very opposite of truth. The law knows nothing of difficulties between husband and wife which do not amount to a cause for legal separation. When a marriage, says Chancellor Kent, (2 Com. 95,) is duly made, it becomes of perpetual obligation, and cannot be renounced at the pleasure of either or both of the parties. It continues, until dissolved by the death of one of the parties, or by divorce.

In *De Manneville v. De Manneville*, (10 Vesey, 60,) Lord Eldon, among other things says: 'This is an application by a married woman living in a state of actual, unauthorized separation, to continue, as far as the removal of the child will have an influence to continue, that separation, which I must say is not permitted by law.' 'I must consider the wife at present as living under circumstances, under which the law will not permit her to live.' In *Commonwealth v. Addicks*, (2 Serg. & R. 174,) Chief Justice Tilghman gives as a principal reason for taking children from the custody of their mother who had separated from her husband, that when they came to inquire why it was that they were taken from their mother, they would be taught 'as far as our opinion can teach them, that in good fortune or bad, in sickness or in health, in happiness or in misery, the marriage contract, unless dissolved by the law of the country, is sacred and inviolable.'

It is not our design to vindicate the policy of the law in this regard, but, in the language of Sir William Scott, in the great case of *Evans v. Evans*, (1 Haggard, 35,) it would not be difficult to show, that the law in this respect has acted with its usual wisdom and humanity, with that true wisdom, and that real humanity, that regards the general interests of mankind. For though in particular cases, the repugnance of the law to dissolve the obligation of matrimonial cohabitation, may operate with great severity upon individuals; yet it must be carefully remembered, that the general happiness of the married life is secured by its indissolubility. When people understand that they *must* live together, except for a very few reasons known to the law, they learn to soften by mutual accommodation that yoke which they know they cannot shake off; they become good husbands, and good wives, from the necessity of remaining husbands and wives; for necessity is a powerful master in teaching the duties which it imposes. If it were once understood, that upon mutual disgust married persons might be legally separated, many couples, who now pass through the world with mutual comfort, with attention to their common offspring, and to the

moral order of society, might have been at this moment living in a state of mutual unkindness—in a state of estrangement from their common offspring—and in a state of the most licentious and unreserved immorality. In this instance, as in many others, the happiness of some individuals must be sacrificed to the greater and more general good.

The real point of controversy in this case may be stated in a very few words. A wife, without any cause known to the law, deserts her husband, and refuses to return and cohabit with him; and has in her possession an infant, the fruit of the marriage. The husband, against whom no incompetency or unfitness to manage his offspring is alleged, demands the custody of the infant; and the question is whether it shall be given up to him. This is the whole question, stripped of every thing which does not necessarily belong to it; and there would seem by the adjudicated cases, to be no doubt, that the claim of the father is completely made out. The whole matter is really contained in a nutshell, and it is extraordinary how many collateral issues have been made up in this discussion and in the opinion of the court. A great deal is said about the vested rights of the father. But this all proceeds on the false basis, that the law regards husband and wife as two. So far as it regards this question, they have no rights as contradistinguished from each other. They are one. The rights of the wife have not been lost, but are merged in those of the husband. She is incapable of making contracts; she cannot sue or be sued. His domicil is hers; his country is hers, and her home is with him. She takes his name and he is entitled to her person and every thing which appertains to her. On the other hand, she is entitled to his protection, support, and affection. He is bound to provide for her in a manner suitable to her rank and condition, and he is liable for all her debts contracted before and after marriage.

The law favors this entire union in every possible manner. It looks with jealousy upon every thing which tends to weaken it; and its dissolution was formerly attended with difficulties well nigh insuperable, although they have been somewhat relaxed in modern times. When the marriage ceremony is performed, all the rights, duties, and relations of the wife are completely changed; and the husband assumes certain responsibilities of which he can never be divested. The common law with a true delicacy, entirely consistent with its stern morality, recognises the wife in her place, and seeks to protect her in her station. She cannot be forced out of it. She is seen in no other view. The sanctity of private life is for her sake made legal. She is not only not obliged in law to appear before the world, but her doing so is entirely discouraged. The husband is, consequently, looked upon as the head of the family, and represents the family. He is also invested with an authority commensurate with his duties, and his jurisdiction in its narrow but important sphere, is perfect and supreme as long as it is exercised within the limits which divine and human wisdom have prescribed. Now, in regard to the custody of their children, the law gives it to neither, in terms, but to *both*. It considers them as one; and

as the domicil of the husband is that of the wife; as she takes his name and follows him wherever he goes, so also do the children. If the wife desert her husband for causes not known to the law, the children remain. She leaves them; and if she take them away, the law interferes and places them where they belong—*at home.*

It is not necessary to vindicate the policy of the law. It is sufficient that the rule is well established; but those who are dissatisfied with it will do well to consider, that no other rule can be adopted with any propriety until the whole order of marital rights is changed. When the husband takes the name of the wife—when he goes to her home—when his domicil follows hers, then, and not till then, will it do to change the present rule. It results from all this, that the rights of the husband and wife to the custody of their children can never be adverse. If the wife desert her husband for no reason known to the law, she is not recognised in law. She has, in one sense, no legal existence; and to talk of her rights as opposed to her husband's, is to talk of the motions of a dead body. If the children are disturbed or carried from home by the mother, the law will interfere and replace them, not merely because the husband has an exclusive right to their custody, but because he has a right which is entirely destroyed if the children are removed. This doctrine is clearly established by a long line of judicial decisions, to a few of which we will take occasion to refer.[1]

The case of the *King v. De Manneville*, (5 East 221,) came up in 1804. In that case it appeared, that the husband was a Frenchman, and had married the mother of the child, an Englishwoman, by whom he had this only child. Soon after the marriage she separated from him on account, as she alleged, of ill treatment, and kept the child, whom she was nursing, with her. One night the husband by force and stratagem found means to get into the house where she was, and forcibly took the child, then at the breast, and only eight months old, and carried it away almost naked in an open carriage in inclement weather; with a view, as the mother apprehended, of carrying it out of the kingdom. A habeas corpus was then obtained, directed to the husband to bring back the body of the infant. Erskine, Garrow, and Gibbs, for the wife, suggested, that the father was an alien enemy, and that the child ought not to be exposed to the smallest risk of being removed out of the country. They also relied upon its very tender age, and that its removal from its mother deprived it of its proper nutri-

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[1] The ancient Roman laws gave the father a power of life and death over his children. But the rigor of these laws was softened by subsequent constitutions, although they maintained to the last a very large and absolute authority; for a son could not acquire any property of his own during the life of his father; but all his acquisitions belonged to the father. Inst. 2. 9. 1.; 1 Black. 452. The mother, as such, is entitled to no power over the persons of her children, but only to reverence and respect. 1 Black. Com. 453. At common law it was an offence to take a child from its father's possession. Andrews, 312. There is a class of cases showing the slender rights possessed by the mother over her children, in case of the death of the father, which go to illustrate our doctrine, but we are obliged to omit them in this discussion.

ment. Lord Ellenborough stopped the counsel on the other side who wished to read affidavits upon the merits, and said: 'We draw no inferences to the disadvantage of the father. But he is the person entitled by law to the custody of his child. If he abuse that right to the detriment of the child, the court will protect the child;' and the child was accordingly remanded to the custody of the father. This case was afterwards carried before Lord Eldon, (10 Vesey, 52,) when the child was eleven months old, who refused to give the possession to the mother. He said: 'I shall take care that the intercourse of *both father and mother* with the child, as far as is consistent with its happiness, shall be unrestrained;' and he made an order that the father should be restrained from taking the child out of the kingdom.

In the case of *Ball v. Ball*, (2 Simons 35; 2 Con. Eng. Chan. Rep. 299,) the child was fourteen years old. The father was living in habitual adultery, on account of which, Mrs Ball had obtained a divorce in the ecclesiastical courts. Her counsel admitted that there was no case for taking away the father's authority, but they submitted, that there was a very good case for granting the other alternative of the prayer of the petition, which was for access to the child. But the vice chancellor said: 'Some conduct on the part of the father, with reference to the management and education of the child, must be shown to warrant an interference with his legal right; and I am bound to say that in this case, there does not appear to me to be sufficient to deprive the father of his common law right to the care and custody of his child. It resolves itself into a case for authorities; and I must consider what has been looked upon as the law on this point. I do not know that I have any authority to interfere. I do not know of any one case similar to this, which would authorize my making the order sought, in either alternative. If any could be found, I would most gladly adopt it; for in a moral point of view, I know of no act more harsh or cruel, than depriving the mother of proper intercourse with her child;' and the petition was dismissed.

In *Ex parte Skinner*, (9 J. B. Moore, 278; 17 Eng. Com. Law Rep. 122.) a father and his infant child, six years of age, were brought up under a writ of habeas corpus, in order that the child might be placed under the care of its mother, and the court refused to interfere, although the husband and wife had separated in consequence of his cruelty towards her, and the father, at the time of the application, was confined in jail, and cohabiting there with another woman, who took the child to him daily; although Lord Chief Justice Best admitted that the court of chancery had a jurisdiction as representing the King as *parens patriæ*, and that court might, under circumstances, control the right of a father to the possession of his child.

In *McClellan's case*, (1 Dow. P. C. 81; 21 Law Magazine, 145,) the mother applied on the ground that the child, a girl of six, was suffering from a complaint of which two of her children had died. 'It might be better,' said the judge, 'that the child should be with the mother, as the mother may be supposed to have learn-

ed the experience of what was best to be done, but we cannot make an order on that point.'

The case of the *King v. Greenhill*, (4 Adolphus and Ellis, 624 ; 31 Eng. Com. Law Rep. 153,) was decided by the court of king's bench, in 1836, and may be supposed to contain the English doctrine on this subject at that time. In that case, the court decided explicitly, that if the party brought up on habeas corpus, be a legitimate child, too young to exercise a discretion, the legal custody is that of the father ; and if the mother has possessed herself of the child adversely to him, and he claims it, the court will oblige her to deliver it up. Nor would it make any difference if the father had formed an adulterous connexion, if it appear that he had never brought the adulteress to his house or into contact with his children, and did not intend to do so. But the court admitted that a child would not be given into the father's custody if it appeared that in his hands it would be exposed to cruelty or to gross corruption. In this case the children were females, and were aged, respectively, five years and a half, four and a half, and two and a half. It appeared, that the husband had, during the years 1834 and 1835, lived in a continued adultery with a Mrs Graham, cohabiting with her at various lodgings in London and Portsmouth ; that in the month of October, when this habeas corpus was obtained, they were living together in London. There was also an affidavit that Mr Greenhill had, in the same month, gone with a female to a common brothel, where it was believed they had passed the night. Mrs Greenhill left her husband on learning his conduct, and took the children with her. The vice chancellor said he had no authority to interfere, and Mr Justice Patterson made an order that Mrs Greenhill should forthwith deliver up the three children to her husband. (21 Law Mag. 146.)

The case subsequently came before the court of king's bench, and Mrs Greenhill made affidavit, that she had instituted proceedings in the ecclesiastical court for a divorce and alimony, on account of her husband's conduct ; that she only desired permission to continue bestowing upon her children the same personal care and attention which they had hitherto received from her, and which was necessary to their welfare ; and that she had always been ready and willing, and offered, and did then offer, to reside in any place, save, under present circumstances, in her husband's own house, and to act with respect to the children, and their management, education, and disposal, precisely as her husband might dictate. She further stated that she would consent even to relinquish the custody and control of the children, if, by the rule or other direction of the court, she might be assured of permission to give them her personal care and attention during their tender years.

The case was argued with great ability, by Mr Serjeant Wilde for the mother, and by Sir John Campbell, Serjeant Talfourd, and Wightman for the father. Lord Denman seemed, at first, to make a distinction where the children were in the custody of the father and when in that of the mother ; but he goes on to say : 'I think the case

must be decided on more general grounds; because any doubts left on the minds of the public, as to the right to claim the custody of children, might lead to dreadful disputes, and even endanger the lives of persons at the most helpless age. When an infant is brought before the court by habeas corpus, if he be of an age to exercise a choice, the court leaves him to elect where he will go. If he be not of age, and a want of direction would only expose him to dangers or seductions, the court must make an order for his being placed in proper custody. The only question then is, what is to be considered the proper custody; and that undoubtedly is the custody of the father.' Littledale J. concurred. He said where each of the parents appeared before the court and claimed the custody, there was no doubt that the court would give it to the father; the mother's application would not be attended to. Williams J. was of the same opinion. The right was in the father, and must take effect.

These cases are sufficiently explicit as to the common law doctrine in relation to the custody of infant children, when there is no disability on the part of the father. In the United States, the same doctrine has been fully recognised and repeatedly acted upon by our most influential tribunals.

In Massachusetts, the case of the *Commonwealth v. Briggs*, decided in 1834, (16 Pick. R. 203,) was a habeas corpus for the body of the child of Samuel Thacher, directed to Briggs and his daughter, the wife of Thacher. The wife was living separate and apart from her husband, without any divorce, or separation by mutual consent, and she claimed the custody of the child on the ground of the father's intemperance. The court entertained a doubt whether the writ could properly be issued against a wife on the application of the husband. This doubt, they say, originated in the well known rule, that there can be no adverse interest between husband and wife, but that in contemplation of law, the custody of both wife and child belongs to the husband and father, and is actually in him. But as the writ was in the name of the commonwealth, the technical objection was avoided. They then proceed to decide, that although there may be cases in which the court would not interfere in favor of the father; as where he is a vagabond, and apparently wholly unable to provide for the safety and wants of the child, yet, in general, the father is by law clearly entitled to the custody of his child, and the court will feel bound to restore the custody where the law has placed it, with the father, unless in a clear and strong case of unfitness on his part to have such custody. They accordingly ordered the child to be restored to the father.

In New York, in the *People v. Nickerson*, (19 Wendell, 16,) the court recognized the doctrine of the common law to its utmost extent, that the father is the natural guardian of his infant children, and in the absence of ill usage, grossly immoral principles or habits, or want of ability to provide for his children, is entitled to their custody, care, and education; and cannot at common law be controlled by the courts

in the exercise of his rights, except as above, or for an abuse of the trust confided to him by law.

In the case of the *People v. Chegaray*, (18 Wendell, 637,) the court affirmed the doctrine, that a father is entitled to the custody of his infant children, and where differences exist between the parents, the right of the father is preferred to that of the mother: but he may forfeit it by misconduct, may be controlled in the exercise of his parental power, and under certain circumstances the care and custody of the children may be committed to the mother.

In the case of the *People v. Mercein*, (Supreme Court of New York, October term, 1840; 3 Law Reporter, 315,) which is the most recent decision on this subject, the common law doctrine as we have stated it, was fully recognised. The court say, it is well settled, that, in the absence of any positive disqualification on the part of the father for the proper discharge of his parental duties, and when there is no special reason touching the welfare of the children, for preferring the mother, the father has a paramount right to the custody, which no court is at liberty to disregard.

In Georgia, in the *Matter of Mitchell*, decided in 1836, (R. M. Charlton's R. 489,) the common law doctrine was most fully recognized. In that case the child was three months old. Its mother died in childbed, at the house of her father and mother, and the child remained there till the father sued out a writ of habeas corpus for the custody. The court say: 'It becomes important, then, to inquire, who has the legal right to the custody of this infant, and it seems to me, that the answer that would rise to the lips of any one, however unskilled he might be in the science of the law, would be, that such right resides in the father. The law of nature, the feelings which God has implanted both in man and the brute, alike demand, that he who is nearest to it, who is the author of its being—who is bound to its maintenance and protection, and answerable to God for the manner in which it is reared, should have its custody, and the law of man, which is founded upon reason, is not hostile to the assertion of this claim.' The court accordingly ordered the infant to be delivered to the custody of its father.

We have presented these cases somewhat in detail, and at the risk of being tedious to our legal readers, to whom they are doubtless familiar.[1] It will appear, that the course of the courts on this subject has been uniform, subject to an exception which we will now notice. That exception is this. When the father wants either the capacity or the means for the proper training of his children, or is in any way disqualified, his right may be controlled or absolutely denied. And this brings us to a consideration of the '*discretion*' exercised by the courts in cases of this sort.

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[1] The (English) Law Magazine, a work conducted with rare ability, says: (Vol. 21, p. 145—February, 1839.) 'The law of England vests the right to the custody of all legitimate children of tender age, without regard to sex, in the father, to the entire exclusion of the mother, who cannot even see them without the father's consent.'

We by no means intend to deny the existence of such a discretion. It is clearly and distinctly recognised by nearly all the cases, and we have no wish to abate from its just force in the least. But what is this discretion? And when and under what circumstances does it exist? Clearly it is not a mere license to the court to do what they please. The common law knows no such discretion as this in any thing. It is a judicial discretion; governed by strict legal rules, within which it must be exercised. But when does it exist? Surely not at all times and under all circumstances. If this were the case, courts of law might interfere with the custody of every child in the state. They could even determine in cases brought before them, whether it would not be best to deprive father and mother both of the custody of their children. This discretion, then, exists *when there is some disqualification on the part of the father for the custody of his children.* This is the fact which must first appear. This is the foundation on which the discretion of the court rests. This is the element which must enter into cases before the courts have any discretion to act upon.

When a child is brought up by habeas corpus, the first object is to free it from illegal restraint, and upon inquiry if it appear, that the infant is of an age to choose, the court will permit it to go where it likes. *King v. Smith*, (2 Strange, 982); *King v. Delaval*, (3 Burrow, 1434); *King v. Greenhill*, (Ad. & Ellis, 624.) If it is of a tender age, and there is no incompetency on the part of the father, the court will at once restore it to the custody of him with whom the law has placed it. But if it appear, that the father is incompetent from any cause, then, and not till then, it would seem, the court may exercise a sound judicial discretion as to the custody of the child.

This doctrine seems to be clearly deducible from the authorities on this subject, although we do not find it laid down in terms; for we are not aware of any decision at all parallel to the one under consideration, where courts have pretended to act upon a discretion on the subject, unless there was some incompetency on the part of the father. The cases may be divided into several classes. The first comprehends those where the child was of age to choose for itself, whose custody it would be under, as in *King v. Delaval*, (3 Burrouw, 1434.) The second consists of those where there was no controversy between husband and wife, as in *United States v. Green*, (3 Mason, 482); *Commonwealth v. Addicks*, (5 Binney, 520); *Matter of Mitchell*, (R. M. Charlton's R. 489); *Matter of Waldron*, (13 John. 418.) Another takes in the cases where the controversy was between husband and wife for infants of a tender age. Now, in no case that we are aware of, which can fairly be considered as parallel to the one here before the court, have the judges exercised any discretion whatever, unless the fact of the father's incompetency first appeared.

A brief review of the cases, with reference to this point, will show conclusively, not only that the court had no authority for the ground they assumed, but that a directly opposite doctrine is clearly established.

In *Commonwealth v. Briggs*, (16 Pick. R. 203,) the wife claimed

the custody of the child on the ground, that the husband was intemperate and in other respects an unfit person to take care of it. The court heard the evidence on this point, and not being satisfied of the husband's incapacity they immediately ordered the child to be restored to him.

In the great case of *Wellesley v. The Duke of Beaufort*, (2 Russel, 1; 3 Con. Eng. Chan. R. 1,) it was expressly alleged and proved, that the conduct of the father was most grossly and disgustingly immoral, and that he took especial pains to teach his children immorality. Lord Eldon then exercised a discretion, and refused to give the children to the father.

The New York cases, so much relied on by the court, do not favor their position at all, for in that state the court have a discretion by an express provision in the Revised Statutes. It is provided, that on the application of the mother, being an inhabitant of the state, in case the husband and wife live in a state of separation without being divorced, 'the court on due consideration may award the charge and custody of the child so brought before it [on habeas corpus] to the mother, for such time, under such regulations and restrictions, and with such provisions and directions, as the case may require.' It has been doubted whether this statute was intended to apply where the wife withdraws from the protection of her husband and lives separate from him without any reasonable excuse; because then the separation would be *unauthorized, and in violation of the law of the land. People v. Nickerson*, (19 Wendell, 18.) However this may be, it is plain, that neither the legislature or the courts contemplated the existence of any such discretion, as is set up in the d'Hauteville case. In the *Matter of Waldron*, (13 John. 418,) the wife was dead.

In the case of the *State v. Smith*, (6 Green. 462,) there was an express agreement between the husband and wife, that the latter might live separate from her husband in the event of certain contingencies, which did happen. It appeared that the father had been guilty of adultery. It was also in evidence, that, in pursuance of his agreement with his wife, he had conveyed a moiety of his farm in trust for the use and benefit of his wife, and that the other moiety of his real estate and all his personal property had been otherwise disposed of; so that, in point of fact, he was *unable to maintain his children.* Now, here was sufficient ground upon which to found a legal discretion, without touching the doctrine we lay down above; for, in the first place, there was an inability, suitably to maintain the children, and in the second place there was an express agreement that the wife should have the children; an agreement which the court considered binding, although this would seem to be doubtful by other cases. *People v. Mercein*, (3 Law Reporter, 315); *Carson v. Murray*, (3 Paige, 483); *Rogers v. Rogers*, (4 id. 516); *Hindley v. Westmeath*, (6 Barn. & Cresw. 200); *Westmeath v. Westmeath*, (1 Dow. Parl. Rep. N. S. 519.)

In this very case the court say: 'Whenever the parent has become unfit, by immoral and profligate habits, to have the management and

instruction of children, courts of appropriate jurisdiction have not hesitated to interfere to restrain the abuse, or remove the subject of such abuse from the custody of the offending parent.' Here is nothing like an admission or assertion of a general and unlimited discretion—but a discretion which arises '*whenever the parent shall become unfit.*'

The case of the *United States v. Green*, (3 Mason, 482,) does not affect our position, because there the mother was dead, and the controversy was between the father and third persons.

Nor does the case of the *Commonwealth v. Addicks*, (5 Binney, 520,) upon which so much stress is laid, conflict with this doctrine. In that case the husband and wife *were divorced.* The unity which had existed was destroyed; they were in law *two persons*, and the court might well have a discretion there, which they would not have in a controversy between man and wife. Besides, it was there alleged that the husband had made no provision for his children; but it was denied on the other side that he was unable to maintain them at that time. The question of incompetency was thus before the court as in other cases, where they have exercised a discretion.

We now come to a *dictum*, for it is nothing more, of Lord Mansfield, in *Rex v. Delaval*, (3 Burrow, 1434; S. C. 1 Wm. Bl. R. 412); which seems to be very much relied upon to show that the courts have a general and almost unlimited discretion. That was a case in which one Catley had apprenticed his daughter to a musician, who gave up her indentures of apprenticeship in consideration of £200 paid by Sir Francis Delaval; and she was then bound to Sir Francis, for the purpose, as it was alleged, of prostitution; and this was an information by the father for a conspiracy against Sir Francis, her former master, and the attorney who drew up the papers. The infant was brought up, and being of age to judge for herself, (18 years) she was discharged. Now, in the first place, it does not appear, that the father claimed the custody of the child—the principal matter before the court being a conspiracy. It also appears, that he had, by indenture, parted with his parental authority. Again; the father and mother were suspected of being parties to this conspiracy. Besides, the question there was not between husband and wife, and the child was of age to judge for herself, making the case entirely different from the one we are considering. Whatever, therefore, may have been said upon the duty of the court, in general, in relation to the custody of infants, was clearly extra-judicial. But there is nothing in the *dictum* of Lord Mansfield, that justifies the great reliance placed on it by the court; and Sir William Blackstone, in his report of the case, makes no note whatever of this *dictum.* He reports the court as saying: 'In the present case, upon the circumstances, we think it is very improper for her to go to her father. He used her ill before she was apprenticed; and by the indenture, has parted with all his parental authority.'

It thus appears, that the cases relied on by the court as authority for this discretion, which they set up, are (1.) *Commonwealth v.*

Briggs, where there was an express alleged incompetency on the part of the father, and in which the court refused to interfere with his rights. (2.) *King v. Delaval*, where the infant had arrived at years of discretion, and there was no controversy between husband and wife. (3.) *Commonwealth v. Addicks*, where there was no controversy between husband and wife, and the infants were not too young to express a choice. (4.) *People v. Nickerson*, which can, in no way, be made to favor this doctrine, except by an entire perversion of the meaning of the court. (5.) *Matter of Mitchell*, where the controversy was not between husband and wife, she being dead. (6.) *Matter of Waldron*, where the wife was dead. (7.) *State v. Smith*, where there was an express agreement between husband and wife, that she should have the custody, which was recognised by the court as binding. (8.) *United States v. Green*, where there was no controversy between husband and wife, the latter being dead. (9.) *State v. Nelson*, and *People v. Mercein*, in which the common law doctrine was affirmed in language as strong as it could possibly be done. These are the authorities relied upon by this court. Not one of them being in any sense a proper precedent; not one of them, that does not, in any just view of it, go to establish an entirely opposite doctrine from that assumed.

It also appears, negatively indeed, from the cases where the courts have refused to interfere with the rights of the father, that this judicial discretion must have for its foundation some alleged or actual incapacity of the father, for in every English case to which we have referred, in which the court exercised no discretion but immediately delivered the children into the custody of the father, noi ncapacity was alleged against him.

From these considerations, it would seem, that courts do not ordinarily have a discretion as it regards the custody of infant children of a tender age, unless it appear that the father is incompetent for this duty. From the fact, that, in no similar case where the courts have acted upon any such discretion has the father's incompetency been wanting, the inference would seem to be warranted, thatthis is a necessary element, without which they have no discretion whatever. This undoubtedly narrows the asserted discretion of the courts very much; but not more than the whole policy of the law upon this subject would seem to warrant.

If this position is well founded, it is clear, that the decision under consideration was entirely erroneous, because it is fully admitted, that here was no incompetency whatever on the part of the father; and thus, after admitting there was no foundation upon which a discretion could rest, the court proceed to exercise one, with a parade of authorities, every one of which differs, in almost every aspect of it, from the case before them.

But admitting that the courts have a general discretion in cases of habeas corpus for the custody of infants, to decide under all the circumstances of each particular case; it is perfectly clear, that this discre-

tion is a legal or judicial one, and gives no authority to act as the judges may happen to desire, or think expedient. In the exercise of their power, they are surrounded by rules, firm and inflexible, within which they must move. Then, in the case of infants, the first, most ordinary and legal course, is to secure their custody to their parents; the effort of the law is, that husband and wife shall have the custody of their children. And, as the law does not favor a separation which is not founded on legal grounds, and as the domicil of the wife follows that of her husband, in order to secure the custody of infants to both of the parents, the law gives it to the father. If the wife has left the husband without any proper cause, it is not her only misfortune that she cannot have the custody of the children. She loses other legal rights besides this.

In any aspect of this case, we are unable to find in the whole doctrine of the law, any just ground for this decision. All the authorities and text writers seem so entirely to negative any such course as that taken by the court, that we confess our astonishment at the result to which they arrived. Even admitting the doctrine of such a discretion as they rely on so much, this decision appears no less extraordinary. No case can be found in England or America, where the father has been deprived of the custody of his child, under such circumstances, or when such considerations as were here adduced were permitted to have any weight. We take it to be clear, that this decision has no authority to stand upon, unless it be the case of the *Commonwealth v. Addicks.* Mrs d'Hauteville herself, and her very eminent legal advisers must be taken to have the same opinion, by her conduct in carefully avoiding the jurisprudence of other states, and taking up her residence in Pennsylvania, because the laws there were supposed to be more favorable to her claim.

Nor are we able to find anything in the case of the *Commonwealth v. Addicks*, which justifies this decision. From the reliance placed upon that authority by the court, and from the manner in which they have stated the case, we were led to suppose that it was a decision so palpably in point, as to fully sustain their decision. But so far from this, it seems to us to be the merest semblance of a precedent that could possibly exist, and we marvel at that 'discretion' which could hold it up as a case at all parallel to the one under consideration.

In the first place, it is worthy of remark, that the report itself is very meagre, and the general doctrine seems to have received very little attention. Not a single authority is referred to by the counsel on either side; and the whole doctrine which is here thought to be set up in opposition to a long line of decisions by the most eminent judicial tribunals in the world, is disposed of in eight lines; and the only authorities which are cited by the court are *King v. Smith*, (2 Strange, 982,) and *King v. Delaval*, (3 Burr. 1436); neither of them relating to infants of a tender age, and neither of them being a controversy between husband and wife.

But the case differs very materially from the one under consideration;

and the decision may be well founded, and not necessarily affect the d'Hauteville case in the least. It was a habeas corpus by a father for his two daughters, one being ten and the other about seven years old. The wife had separated from her husband and had committed adultery with another man. *The husband had procured a divorce* and the wife married her paramour. This makes the case materially and entirely different from the one before the court. The marriage was annulled. The unity was broken; there could be no re-union, and the common law doctrine, that the wife can have no rights adverse to the husband, did not apply. It was, in fact, a question as to the custody of the children in the case of a divorce, where the law recognised the separation and where the court might very well have a discretion, which would not exist in a case like the one we are considering. Indeed, in many states, an express power is lodged in the proper tribunals to decree as to the custody of the children in cases of divorce.

Again; in that case the children had lived with the mother ever since the separation. They were of age to have the legal ability to make a choice in the premises, and the presumption may have been, that they chose to live with their mother. Now, nobody doubts, that where children are brought up on habeas corpus, and are of age to choose, they are allowed to go where they will, and the court will not interfere to compel them to go to either father or mother. It is obvious, that a case where the infant is incapable of a choice stands upon entirely different ground, and requires the application of different principles. Indeed, there is scarcely a point of similarity between the case of Addicks and of d'Hauteville. The former was not a difficulty between husband and wife; it did not relate to an infant too young to express any choice; the children were of a different sex; and there was a question in regard to the ability of the father to maintain them.

But this same case came again before the court, and the former decision was, in point of fact, overruled. (2 Serg. & R. 175.) If it is said, that the court affirmed their previous law but considered the facts different, we answer, that, from the opinion, there is reason to believe the court were ashamed of the law as they formerly laid it down; for the reason they give, when the case was before them the second time, for making a different order in relation to the custody of the children, namely, that they had arrived at an age when it might be injurious to their morals to remain longer with their mother, does not of itself seem sufficient. It is difficult to understand the reason why, if two children, nine and thirteen years old, will suffer from a bad moral influence, they are not in still greater danger, when three years younger; and in this case the younger of the two children when delivered to the father was as young as the eldest had been when denied to him. It strikes us, that the court were not unwilling to get rid of a precedent which was, apparently, opposed to the whole course of the common law.

But admitting the doctrine of a loose and general discretion being lodged in the court to do what they thought was best under all the cir-

cumstances of the case, the result to which they came in this instance seems no less extraordinary. They speak of the interests of the child as being the paramount consideration; and they seem to forget, that the rights and interests of others are to be taken into the account at all. But the interests of the child and of the parents are so identical, that they are not to be separated. The law—religion—nature herself, declare the presumption to be, that it is best for the child to be in the custody of the authors of its being. It is not for courts of justice to decide, that this great law of nature, sanctioned and enforced by the law of society, is to be controlled upon slight grounds. Let the child remain with the natural guardian which God has provided for it, unless it clearly appear, that he is unfit for that guardianship.

And has the father no *rights* in this matter? Is not the child bone of his bone, and flesh of his flesh? Is he not bound to maintain it, and is it not the heir of his patrimony? But here the wife refused to permit the father even to see his child except at long intervals and in the presence of witnesses. After crossing the Atlantic, many months elapse before he is permitted to look upon his first born son. He is told that he can have no control over it; no voice in its education; no comfort from its society; in its very name his wishes are disregarded. He has done nothing to merit this treatment—nothing to forfeit the rights of a father to the comfort and society of his child. The law, religion and humanity are all in his favor; but he does not harshly insist upon his extreme rights. He intreats his wife to return to him so that they may both have the custody of the child. She utterly and with bitterness, refuses—accuses him of cruelty for endeavoring to get possession of his own son, and conceals herself from his presence. He desires re-union; he wishes for peace; he expresses a hope that they may still live in happiness and rear their common offspring together. She desires none of these—she hates his home—she bitterly upbraids the husband she has promised to love and obey; and declares he shall have no share in the custody of the child. Now, consider a case of this sort as a mere matter of discretion, and can there be but one decision consistent with justice? Does not a bare statement of the facts, stripped of every thing which does not belong to them, show more clearly than words can tell, the wisdom of the common law doctrine that the rights and interests of the father and his children are the same; and that the mother shall not be permitted, with unnatural violence, to attempt to sever them.[1]

[1] Nothing can show the singular character of this decision and the injustice of it, more clearly than the concluding sentence, in which the court remark with admirable coolness: "Should the father remain in America, or at any time revisit this country, we cannot doubt that every reasonable facility of access to his child will, at all proper times, be afforded to him by the respondent and her parents, should she continue to reside with them. It would seem to be his right—one which possibly he could not enforce by legal proceedings, but of which we cannot apprehend the slightest disposition to deprive him—to exercise, through the medium of some proper agent, a share of tutelage and superintendence of the education of the child or an agent who

But this is not all. The husband had other rights than those appertaining to his child, which addressed themselves with great force to the court. He stood before them a much injured man. His feelings had been outraged; his home made desolate; without any fault of his own, he found himself, to use his own language, in the position of a deserted husband, a bereaved parent, bereaved, not by the hand of death, but by the calm and deliberate act of her, who, at the altar, had sworn to love, to honor, and obey him. His family and his friends, the circle of society in which he moves, his countrymen generally, were not blind to this position. They beheld it with surprise, and in their simple integrity, conceived it to be unaccountable, and to be one which demanded action and explanation, at his hands. Its continuance, without explanation, was inconsistent with the stern morality and the religious requisitions of his own people. He came to America, not to enter into controversy with his wife, with her whom he had chosen, and owned as his partner for life, but in good faith, to reclaim her —to lead her back to that home which she had once declared should be her home, and to that people which she had declared should be her people.

It was for the interest of the wife also, that this child should be restored to the father. If her separation from her husband has been produced by the interference of others, then should the court have offered her an inducement which she could not have resisted, to return to her husband, by giving to him the child. It seems clear, that the breach between the parties was not so great that it might not be closed up. The husband desired re-union. The wife had declared, that in whatever situation she might be placed, she would never leave her child. It was in the power of the court to effect a reconciliation. That power should have been exerted to its utmost limit. But it seemed to be admitted, that whatever might be the disposition of the child in this case, it must sooner or later be given to the father. Was it not for the wife's interest that it should be done as soon as possible and while there was hope of a re-union? Upon this point, we adopt the eloquent language of the counsel who opened for the relator.

"The court will be told of hardship—that it is hard to take the child from the mother *now:* leave it, you are told, for a season, and the agony will be less. Will that decree be kind? Far, very far from it. If there be one true pleasure in a parent's heart, it is to watch the growth and progress of the child, its budding intelligence, its ripening mind, its first step, its first word. But if your honour's decree be such as the respondents ask, will these be signs of joy to this young mother? Just the reverse: they will tell of the lapse of time, of the sure flight of the few years the child can be hers; they will count the moments of protracted agony—of agony from which there can be no relief. In kindness spare

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could see the child from time to time, and communicate with him in regard to its health and discipline."

The marginal note to this part of this opinion would properly be thus: It *seems*, that a father has a right to see his own child—*occasionally*.

"Seems, madam! nay it is, I know not seems!"

her this delay. It is not for the "best interest" of any to perpetuate such feelings and such sufferings as these. Give this child to its father, and you pronounce the most just and gentle judgment your honours ever gave."

Nor were the interests which society in general had in the result of this controversy to be overlooked. The institution of marriage is undoubtedly the greatest blessing given to man, and to preserve its purity and constantly guard its integrity is the duty of every well wisher of humanity. Courts of justice in particular are enjoined by the stern mandates of the common law, constantly and with untiring zeal to watch over this institution and to uphold it, in its ancient simplicity and purity. Whenever cases involving principles having relation to domestic rights and duties, come before the courts, the judges have felt called upon to enforce the doctrines of law and morality, with all the authority with which their situation invests them. The courts will always look to the effect of their decision upon these rights and duties; and in matters of this sort will make the public weal a very element in their determinations. In a case, then, where a wife has wilfully deserted her husband and does not pretend to offer a legal excuse for her conduct; and still more, where he is deprived by her of his only child, it would seem to be a grave consideration whether a court would, if they could keep it, make a decision which could by any possibility seem to favor such conduct. But never before, we believe, has a court been so lost to its own dignity and duty, as not only to sanction such behaviour by their decision, but also to take especial pains to justify conduct, which must be considered as illegal as it is immoral.

The court have not taken notice of any of these considerations. They seem to found their decision entirely upon the ground, that the present welfare of the child alone is to be considered. The future—the general—the eternal interests of this boy are not taken into the account. But are we, therefore, not to consider them? Are we to forget, that here is a Swiss boy violently kept from his own country—the land where he is to pass his life? It is the dictate of simple nature, that he should be carried there now. Let him breathe the free mountain air of his own land. Let him early be surrounded by the objects he must learn to love so well. Let him grow up with the friends with whom he is to pass his life. Let him open his eyes upon the land of his fathers and early imbibe that love of country so prominent a characteristic of his people. The child is a boy. He is the heir of his father's patrimony—the inheritor of his honors. Let that father educate him to receive and transmit them without reproach. At this early age, he is receiving a foreign education. He is growing up in ignorance of those very things most important to his future welfare. Of all his life, his present days are those, which he most needs to pass in his own country. More; he is forming attachments which must soon be cruelly severed. The friends of his youth he must soon forget, and all his earliest recollections must be blotted from his memory.

But of far more consequence is the moral education of this child.

It was the natural and proper desire of his father, that the religious faith of his boy should be similar to his own, which differs from that of the family of his wife. It is not necessary to decide which creed is the nearest truth. It is enough, in considering the interests of this child, that his father has very strong religious feelings, and at whatever age he receives his son will desire to impress the same on him.

Moreover, this child is of precisely that age in which he is the least protected from evil influences; and it was a consideration deserving great weight, that the father expressed little confidence in the moral integrity of those who would surround him, if left in the custody of the mother. In this connection the whole circumstances attending the marriage and desertion of this wife, have great force. Now, whatever may be her general conduct and that of her friends: however high their rank in society, if the facts which appear in this case are to receive their just weight, it is impossible to doubt, that here has been conduct which cannot be justified in law or by the usages of society. In this view of the subject, there are some questions, which demand an answer. Is this wife living in a condition which is recognised by any law, human or divine, or is she not? Is her conduct and that of all who have advised or assisted her, immoral, or is it not? Is there here exhibited a want of integrity—a disregard of the rights of others and a fatal mistake on a fundamental point of morals, which were entitled to grave consideration, in considering the welfare of this child?

These are questions for the moralist. But how is it in law? If the positive and repeated averments of the relator are true—and we express no opinion on that point—it might seem to many that here has been a gross offence against the laws of at least one of the United States. In Massachusetts, the law of CONSPIRACY has recently received an able exposition in the case of the trial of a few journeymen bootmakers, for a combination to keep up the price of their labor. The learned judge laid down the law to be, that it was an offence for two or more individuals to combine to commit an unlawful act by unlawful means, or even to do a lawful act by unlawful means, to the injury of the public, or of any individual. The gist of the offence consists in the unlawful confederacy, and it is complete when the confederacy is made; and any unlawful act done in pursuance of it, is no constituent part of the offence, but merely an aggravation of it. *Commonwealth v. Hunt and others*, (3 Law Reporter, 290).

But without going to the extent of asserting, that here is room for a criminal prosecution, we cannot doubt that it is owing to Mr d'Hauteville's forbearance, that a civil suit was not long ago commenced against all those who have been instrumental in harboring and concealing his wife and child. That such an action, properly instituted, would be maintained wherever the common law is known, we have not a doubt. It results from the great principle, that wherever there is a wrong there is a remedy, and is sustained by express decisions in analogous cases.

Now, if the parties who seek the custody of this child have violated the law of the land and are doing so every day while this separation continues. If their conduct is immoral as well as illegal, it was a very grave consideration, whether this child should be permitted to remain in the custody of the mother even if the father were known to be incompetent. Put this case on the ground of a judicial discretion, and was not this *wife* shown to be incompetent for the custody of her offspring?

The grounds upon which the court finally place their decision are not the least extraordinary part of this case. This great question is decided almost exclusively upon the tender age and feeble health of the infant. Philadelphia, where this child was conveyed for the express and only purpose of having this question determined, is found to be the only place where its health can be preserved! Philadelphia water is indispensable! Of all grounds ever assumed by a court of justice for the determination of a question of law, this is the most futile and shallow. When Lord Eldon, many years ago, after great consideration and hesitation, deprived a father of the custody of his children because his character was so immoral as, in his Lordship's opinion to render him unfit to perform the duties of a father, it was considered by many as a great stretch of power; but here we have a court stepping into the domestic forum, and actually deciding questions which are exclusively within the province of him, who is by law constituted the head of his family.

We are not of those who entertain constant fears of judicial encroachments on private rights. But we confess there is something startling in the grounds upon which this decision is placed. Here is nothing less than an assumption of power by a court to determine in regard to the domestic arrangements of a man's family. A father shall not have any share in the custody of his child because he is about to take it to a country where its health will be endangered and cannot procure such attendance as the child needs! There is no nurse so good as the mother, but the mother will not go; *therefore* the child must remain! This is certainly a most singular interference with domestic rights. If a court may upon the process of habeas corpus, sued out by a wife, control the wishes of a father on account of the health and age of his children, what is to prevent their interference as against both parents? Why may they not regulate the whole domestic economy of families. It is undoubtedly true, that the welfare of many children requires their separation from both parents; and why may not this court proceed to make inquiry into the condition, health, age and general welfare of all the children in the state? If in every case of a habeas corpus brought before them, the interest of the child is the prominent consideration, why may they not control the wishes of both parents, if in their judgment the health or tender age of the child require it?

But we do not understand by what authority such an interference as is here attempted can be justified. The domestic hearth is protected

and the domestic government is justly administered, by its domestic head. A court of justice has no more right to trench upon the appropriate duties of a father, than he has to assume the functions of a judge. The questions which the court have assumed to act upon in this case, are exclusively within the jurisdiction of the father. It is for him to judge in regard to the climate which is best for his children, as well as to decide other questions of domestic economy; and his authority is supreme until he breaks the laws. If he err in judgment, it is not for courts of law to attempt to set him right. In this very case, if the climate of Switzerland would be dangerous for this child, the presumption is, that the father, after ascertaining the fact, would not take him there; and no court has a right to assume that, in all things appertaining to his proper duties, a father will not act for the best interests of his child.

But the evidence in regard to the health and age of this child is very unsatisfactory. It does not sustain the court. Nobody doubts that it is better for infants to be with their mothers. But was it so indispensable, in this case, as to render it necessary for a court to interfere with the just duties of the father. None of the physicians come up to this in their testimony. Dr Warren says distinctly, that a robust female, though not a mother, would undoubtedly be a better superintendant of the child than a mother of infirm health; and he did not consider the mother's care and knowledge absolutely indispensable in this case. He says, indeed, that the child is decidedly not of an age to be separated from its mother; and we would add, that this wife is not of an age to be separated from her husband. Dr Meigs, said, '*cæteris paribus*, a child is much better with a mother of intelligence and honesty, than with any one else.'—'I think the chance of raising the child would be diminished by separating it from its mother.' We think so too; and this was a consideration to be addressed to the *father and mother;* but what had the court to do with it? Dr Chapman (with the court, 'we name these physicians *in the order in which they were examined!*') testifies to the same effect. The amount of the whole is, that it would be better for this child to have a mother's care, and Philadelphia water is most excellent—considerations which addressed themselves to these parents; but which the court had no sort of right to entertain a moment.

The direct effect of such a course as this is to encourage separations between husbands and wives. It is, in fact, assuring the latter, that their children shall be secured to them, however much in fault they may be. They have only to procure medical evidence that their infants of a tender age ought not to be separated from their mothers; that they are somewhat feeble, and that it may endanger their lives to remove them out of Philadelphia, and the court of general sessions will, in its discretion, order the children to remain in the custody of their mothers '*for the present.*' Meanwhile, they naturally become attached to those with whom their first years are passed, and their minds may be intentionally poisoned against their fathers. When they become

of a suitable age to be separated from their mothers, they will express a choice to remain with them, and then, the court, acting on the authority of those decisions, where it was held that children who are old enough to express a choice should be permitted to do so, may refuse to interfere. It will thus result that the paternal right may be entirely destroyed. Any wife who chooses to desert her husband and take with her her infants of a tender age, may throw herself upon the '*discretion*' of the court of general sessions for the city and county of Philadelphia, and unless her children are more robust than most children are, she may be secure from any impertinent interference, in their education and custody, by her husband and their father, although 'it would seem to be his right' to see them *occasionally!* A decision which leads to a result like this needs no condemnation when it is understood.

Upon the whole, we do not hesitate to say, that this decision is one of the most extraordinary ever made in this country. It is altogether anomalous in point of law; it is immoral in its tendency. It has no parallel in the English or American reports. It is in direct violation of a principle as old as our law, and which is recognised in the jurisprudence of all civilized nations. We cannot believe it will be recognised in Pennsylvania, by any respectable judicial tribunal. At the same time, it is a matter of deep regret that it was ever made, not merely because it works great injustice in its immediate effects; but because, affecting a foreigner of high respectability, it may be looked upon abroad as a specimen of our jurisprudence.

We will now bring these remarks to a close. It was our intention to have said something on the general doctrine of our law respecting marital rights; but we have already occupied more space than we intended, and can only remark, that we desire to see no relaxation in the common law doctrine in relation to the custody of children. No other rule can be adopted which will work so well. Certainty, of all things, in a matter of this sort is desirable; but it can never be attained if an unlimited discretion in each particular case is exercised by our courts; and a power will be introduced into the domestic forum which will work infinite mischief. In our country, marriages are easily formed, upon slight acquaintance, at an early age. The tendency with us is to look upon the institution as less important and indissoluble than it is regarded by the common law; and divorces are easily obtained. In many states those difficulties between husband and wife must be slight indeed, which will not procure a divorce. In our judicial tribunals, the law should be administered on this subject in its ancient simplicity. Let the wife feel, that her home and the home of her children is with her husband. There the strong arm of the law is constantly upheld for her protection; there, in her appropriate duties, she is recognised, and moves in freedom without a fear. And if she is tempted to depart from her duty, let her know and feel, that the domestic hearth will be protected; that her husband and her children may still gather around it, and if she attempt to disturb them in their rights, the whole force of the law may be moved in their defence.

In conclusion, we desire to say, that we have no personal knowledge of any of the parties to this unhappy controversy. These proceedings show, that the respondent and her friends occupy a station in society from which we have a right to expect a strict regard for the laws of God and man. They can hope for no immunity from censure or punishment if they violate them. In a court of justice, and before the bar of public opinion, they stand in the same position as the humblest litigant. It is no fault of ours that their conduct has been discussed with great freedom in the preceeding remarks. We have not even a regret to express on the subject. We are free to confess, that our sympathies in this case are all one way. We give them to him whom we believe to be legally and morally right in this controversy—to the husband who has been cruelly separated from his wife—to the father who is denied the custody of his son—to him who has shown throughout a sincere affection for the wife he has promised to protect, and an honest desire for her to return to his home and his country. For those, one and all, who have succeeded in defeating the rights which are his by the laws of God and man, we will not express a sympathy, which we do not feel to be deserved.

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